while other customers paid only 3*l.* 8*s.* Lord ELDON sent the case to a jury to determine "whether this was an agreement for a division of the profits, or B. stood only in the relation of a vendor of beer to this retailer at 4*l.* 5*s.* per barrel, in consideration of paying half his rent, selling to others at 3*l.* 8*s.*" Now, if we seek to apply the rule of *Cox* v. *Hickman* to this case, we find it just as difficult to say whether A. and B. were mutually principal and agent, as it is to decide as an original question, whether they were partners or not. We shall not undertake to solve the problem, but will leave it to suggest its own solution, in the belief that this article has already exceeded its proper limits.

The reasoning contained in the foregoing observations may not *always* be capable of easy and useful application, still there may be many cases in which it will facilitate the solution of the main question and lead to satisfactorily conclusions. And especially is this likely to be true in cases of annuities and loans, or in cases like that of *Cox* v. *Hickman*, where it may be important to show that the liability is completely exhausted in some intermediate party and consequently cannot reach beyond. For as we have seen, the person to be charged must be a party to a contract either express or implied, and where it is not expressed and cannot be inferred from the actual relations of the parties, there can of course be *no* contract and by consequence no liability.

S. D. DAVIES.

RECENT AMERICAN DECISIONS.

Supreme Court of the United States.

THOMPSON DEAN *v.* THOMAS A. NELSON AND WIFE AND BEN. MAY.

A mortgagee could not foreclose his mortgage by proceedings in a court within the Union lines during the rebellion, when the mortgagor was within the Confederate lines. A notice to the mortgagor by publication in a newspaper was not a legal notice and proceedings founded thereon were wholly void.

APPEAL from the Circuit Court of the United States for the District of West Tennessee.

The opinion of the court was delivered by

BRADLEY, J.—Thompson Dean, of Cincinnati, prior to the

breaking out of the late rebellion, was the owner of a large amount of capital stock in the Memphis Gas-light Company, a corporation of Tennessee, located and doing business at Memphis, in that state. In May 1861 he transferred his entire stock to James H. Pepper, secretary of the company, to enable him (Pepper) to make some disposition of it in view of approaching hostilities. On the 11th day of June 1861, Pepper sold and transferred fifty shares of $100 each to Thomas A. Nelson, then of Memphis, at par, receiving for the consideration Nelson's note, under seal, dated June 11th 1861, whereby he promised to pay to the order of Pepper $5000, with interest at 6 per cent. per annum, out of the net receipts of earnings on the sum of $5000 of the capital stock of the company, payable in quarterly instalments, the interest being first paid and balance of said net receipts then to be applied upon the principal, which instalments should amount to such sum of money as should be equal to the quarterly net receipts of earnings on $5000 of the capital stock of the company; it was further expressed in the note that it was given for the purchase-money of $5000 of the capital stock of the company, sold and transferred to Nelson by Pepper; and that if Nelson failed to pay any of the instalments quarterly, as aforesaid, after the receipt by the company of said net earnings, then the full sum of $5000, with interest, less interest and instalments paid, should become due and payable.

To secure the payment of this note Nelson, on the same day, executed to Pepper a paper, in the ordinary form of a mortgage, conveying to Pepper, his heirs and assigns, the following real and personal property, viz.: so much of Nelson's individual interest, right, title, and estate in the property and premises of and belonging to the Memphis Gas-light Company as should be represented by and equal to the $5000 of capital stock of said company at par, then describing the real and personal property which the company owned, being gas-works and other property in Memphis, and concluding with the usual condition, to be void on the payment of the note according to the tenor and effect thereof. This mortgage was duly acknowledged and recorded in the registry of mortgages for Shelby county. On the 20th day of July 1861, Pepper sold and transferred to Nelson one hundred and fifty-four additional shares of said company, at the par value of $15,400, and received a similar note and mortgage

for the consideration thereof. It appears from the evidence in the case that Pepper sold this stock to Nelson and the remainder of Dean's stock to other persons, when he did, under apprehension that it would be confiscated by the Confederate authorities, as was threatened to be done, and from a desire to leave Memphis for his own personal safety. But Nelson swears that he made the purchase of the stock in good faith, and he received it without any trust or pledge for its return.

The war soon began to rage with severity, and all intercourse between the states in rebellion (including Tennessee) and the other states of the Union, was not only interrupted, but was prohibited by President Lincoln's proclamation of August 16th 1861, made in pursuance of the Act of Congress of the 13th of July previous.

Nelson continued to reside at Memphis, within the Confederate lines, and received the regular quarterly dividends on the two hundred and four shares of stock, but did not and could not make any payment to Pepper or to Dean, to whom Pepper assigned the notes and mortgages, they both being within the Union lines. The amount of dividends thus received by Nelson was $3672.

On the 1st of June 1862, Nelson transferred one hundred and ninety-four shares of the stock to his wife, having previously transferred ten shares to May. Both transfers were without consideration, except that the object of the transfer to May was to make him a director, and the professed object of the transfer to Nelson's wife was to make a separate provision for her maintenance.

On the 6th of June 1862, the Federal forces entered the city of Memphis, and held military possession of that part of Tennessee until the close of the war. Dean visited Memphis during the summer and fall of 1862, and saw Nelson there, who failed to make any payment on the notes. Nelson swears that Dean refused to receive any payment, alleging that the stock was absolutely forfeited by the failure to pay. Dean swears that he asked Nelson what he proposed to do about the payment of the net earnings which he had received, and that Nelson answered that he was not disposed to pay it, because he might have to pay it again to the Confederate Government. From the evidence in the case (the testimony of Fitch) we are inclined to believe that this

ground was assumed by Nelson, and that he did not make an unequivocal tender of the money due, and whilst it is probably true that Dean insisted that the stock was forfeited, we are not satisfied that his conduct was such as to obviate the necessity of a tender by Nelson if the latter wished to prevent the principal from becoming due. At this time Nelson was allowed to remain peaceably within the Union lines, and there was no reason why he should not have paid the money to Dean.

On the 5th of April 1863, Nelson, with his family, was ordered to remove south of the lines of the United States forces, and not to return. This order was made in retaliation for some outrages committed by guerillas in the vicinity. In pursuance of it Nelson and his family removed within the Confederate lines, and remained therein during the remainder of the war; and were not permitted to re-enter Memphis, although Nelson, at one time, requested permission to do so. The other complainant, May, was within the Confederate lines during the entire contest.

On the 25th of April 1863 General Veatch, then commanding the military district of Memphis, by a special order, established and organized a court or civil commission for the hearing and determination of all complaints and suits instituted by loyal citizens for the collection of debts, enforcement of contracts, prevention of frauds, recovery of the possession of property, and generally to do whatever can be done by a court deriving its powers from military authority. Before this court or civil commission, on the 1st day of September 1863, Dean filed a petition for the foreclosure and sale of the two hundred and four shares of stock, in order to raise the amount due on the notes. The present appellees, Nelson and wife and May, were made defendants, but were returned not found; and publication of notice to them to appear was made in accordance with the laws of Tennessee existing prior to the rebellion. No appearance being effected, a decree was made, execution issued, and the stock was sold by the marshal on the 23d day of October 1863, to one Hanlin, and was subsequently transferred to him on the books of the company by the secretary, pursuant to an order of the civil commission. Hanlin immediately transferred the stock to Dean. From that period to the institution of this suit Dean drew the dividends on the stock.

The appellees filed the bill in this case in June 1865, praying,

in substance, that the stock might be decreed to belong to them, and that Dean might account for all the dividends received by him, to be applied to the payment of the notes, &c., and for general relief.

The appellant, in his answer, sets up and insists upon two grounds of defence: First, the forfeiture of the condition of the mortgage, which, under the circumstances of the case, and from the unconscionable nature of the transaction, he insists should be held to be an absolute forfeiture, without benefit of redemption; in other words, that the instrument should be regarded as a conditional assignment or transfer, and not as a mortgage. Secondly, the defendant sets up the proceedings before the civil commission, by which, as he contends, even if the instrument were a mortgage, all equity of redemption in the stock was foreclosed. The appellees, on the contrary, insist that the paper was a mere mortgage; that the condition in the notes making the principal due if the instalments were not regularly paid was in the nature of a penalty, and should not have been enforced in an equitable proceeding; that the court or civil commission was illegal and without authority; that it never had any jurisdiction of the person of the appellants, nor of the property attempted to be foreclosed; that the existence of the war, and the residence of the appellees within the Confederate lines, forbade any legal proceedings against them or their property; that, therefore, they have been illegally dispossessed of the latter, and are entitled to have it restored to them without conditions; and, finally, that the appellant is accountable to them for the dividends received by him, to be credited on the notes.

In determining the questions raised by this record, in the first place, Dean must be regarded as concluded on the question of the sale of his stock. Had the transaction been merely an agreement for a sale upon the terms on which the sale was actually made, and this a bill by the vendees for a specific performance, we should find great difficulty in distinguishing this case from that of *Dorsey* v. *Packwood*, 12 Howard 126. But here the sale was actually made, and the stock was actually transferred to Nelson, so that, in the absence of fraud, it became absolutely his. And in support of the *bona fides* of the transaction, it may be said, that in view of all the contingencies of the situation, the arrangement was at the time an advantageous one for Dean. At

all events, he chose, on the whole, to acquiesce in it, and in his bill to foreclose the stock, presented before the civil commission, he makes no claim but that of holder of the mortgage, affirming and claiming under Nelson's title throughout. And in his answer to the present bill he nowhere hints that Nelson was guilty of any bad faith in the transaction, or made any agreement to hold the stock for him, or in any other way than as a *bonâ fide* purchaser thereof. And it is hardly correct to say that Nelson incurred no obligation in the transaction. He agreed to pay the whole amount immediately in case of failure to pay any instalment after the receipt *by the company* of the net quarterly earnings. And this condition was not in the nature of a penalty, as surmised by the appellees; but was of the substance of the contract. So that, on failure to pay or tender the money received by him, or by the company, on account of the stock purchased, the whole debt became due and payable as a personal obligation of Nelson.

But, at all events, the stock was actually sold and transferred, and became the property of Nelson, and was possessed by him. The contract was an executed contract, and that transaction cannot now be impeached.

The next question relates to the character of the instrument given by Nelson to Pepper as security for the payment of his notes. Was it a conditional sale, or was it a mortgage? On this question hardly a doubt can be raised. The court is asked by the appellant, under the circumstances of the case, which the appellant asserts to have been unconscionable on Nelson's part, to *consider* the instrument as a conditional conveyance of the stock, and not a mortgage. But the court has no power over the transaction to make it other than, or different from, what the parties themselves made it. If it is a mortgage, it is the duty of the court to declare it a mortgage; and if it is a mortgage it has, perforce, all the incidents and privileges of a mortgage; and that it *is* a mortgage there is no room for question. The principal engagement is contained in the note, which creates a debt as soon as earnings or dividends are received. The other instrument is secondary, and is intended as security for the payment of the note. The appellee himself, in his proceedings before the civil commission, treats his claim as a debt, and the instrument of

security as a mortgage. He calls it a mortgage; and the doctrine of "once a mortgage always a mortgage," applies to it.

Then, being a mortgage, whether of real or personal property, the mortgagor has an equity of redemption, unless it has been extinguished in some legal way. The great question of the cause is, whether the equity of redemption has been extinguished.

It is unnecessary to decide whether the mortgage was one of real or of personal estate, or whether it was a legal or only an equitable mortgage. As no attempt has been made to cut off the equity of redemption, in any other manner than by legal proceedings, the question is reduced to the simple one, whether those legal proceedings are valid and effectual for the purpose.

It is objected that the court or civil commission was not legally established; but it is not necessary to determine that question, as the proceedings themselves were fatally defective. The defendants in the proceedings (the appellees here) were within the Confederate lines at the time, and it was unlawful for them to cross those lines. Two of them had been expelled the Union lines by military authority, and were not permitted to return. The other, Benjamin May, had never left the Confederate lines. A notice directed to them and published in a newspaper was a mere idle form. They could not lawfully see nor obey it. As to them, the proceedings were wholly void and inoperative.

This leaves the equity of redemption in the mortgaged property unextinguished; and it is, therefore, the right of the appellees to redeem it.

In the opinion of the court, the whole principal and interest of the notes have become due and payable, and a redemption and retransfer of the stock should be decreed only on condition of the payment of principal and interest in full, after giving to the appellees credit for the sums received by the appellant; legal interest on each side to be allowed.

The decree of the Circuit Court, therefore, will be so far modified that, instead of requiring the appellant to forthwith transfer the stock, as directed in the decree, he be decreed to transfer it to the defendants, Miriam W. Nelson and Benjamin May, respectively, as therein directed, upon payment by the appellees to the appellant of the amount which shall be found to be due to him on the said two notes, after taking and stating the account

in the said decree afterwards directed; neither party to recover costs of the other in this appeal.

It is one of the effects of a state of war to make unlawful all pacific unlicensed intercourse with the enemy. This general principle of the law of nations was well stated by JOHNSON, J., in rendering the opinion of the court in the case of *The Rapid*, 8 Cranch 155. He said: "In the state of war, nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent states exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat." "On this point," he adds, "there is really no difference of opinion among jurists:" see also *Amory* v. *Gamage*, 15 Johns. 24; *Griswold* v. *Waddington*, 16 Johns. 438; *Seaman* v. *Waddington*, Id. 510; *The Venice*, 2 Wal. 258; Vattel, Droit des Gens, B. 3, Ch. 5, sec. 70; Grotius, De Jur. Bel. ac Pac., Lib. 3, Ch. 3, sec. 9; and Ch. 4, sec. 8; Burlamaqui, Prin. du Droit Nat. et Pol., Pt. 4, Ch. 4, sec. 20. It follows, that any conduct, communication, or intercourse inconsistent with a state of war is unlawful. See all the authorities cited in this note, particularly *Griswold* v. *Waddington*, 16 Johns. 438, 452, 457, 474, 478, 479, 481–485, where the cases are collected by Chancellor KENT, and the rule announced, that no unlicensed intercourse whatever with an enemy is lawful. But see, *contra*, *Mixer* v. *Sibley*, 1 Chicago Leg. News 297, in effect overruling the case of *The Rapid*, 8 Cranch 155. See also *Kershaw* v. *Kelsey*, 100 Mass. 561. The chief difficulty is to apply this general rule to particular cases. It will aid us to that end, to consider the reasons upon which it stands. Two reasons may be given: Any communication or intercourse, not hostile, between belligerents, however innocent or apparently harmless, would furnish opportunities for treasonable practices; and, if commercial in its nature, or involving the making or executing of contracts, it would tend to increase the pecuniary resources, or relieve the financial embarrassments, of the enemy. Accordingly, all trading, negotiating, or contracting, and all performing of contracts existing before the war, with one now an enemy, are forbidden. Contracts made before the war, but remaining unexecuted at the time of its outbreak, are suspended so long as the war lasts; those made, *flagrante bello*, are absolutely void: *Crawford* v. *The Wm. Penn*, 3 Wash. C. C. 484; *Griswold* v. *Waddington*, 16 Johns. 438; *Ex parte Boussmaker*, 13 Vesey 71; Wheat. Int. Law, secs. 305–317; *Leathers* v. *Ins. Co.*, 2 Bush 296; *Willison* v. *Patterson*, 7 Taunt. 43; *Hanger* v. *Abbott*, 6 Wal. 532; *Tucker* v. *Watson*, 6 Am. Law Reg. (N. S.) 220; *Dorsey* v. *Kyle*, 30 Md. 512. If the operation of the general rule be deemed disadvantageous, the political power can relieve from it by granting licenses to violate it: *Coppell* v. *Hall*, 7 Wal. 542; *McKee* v. *United States*, 8 Id. 163. Thus, it is clearly unlawful to buy from or sell to an enemy goods or merchandise, whether contraband of war or not: *The Ouachita Cotton*, 6 Wal. 521. The state of war operates upon the relations of debtor and creditor, suspending them while the war continues: *The United States* v. *Grossmayer*, 9 Wal. 72. So, the drawing, negotiating, or remitting of bills of exchange, upon or for the account of an enemy, is unlawful: *Griswold* v. *Waddington*, 16 Johns. 438; *Willison* v. *Patterson*, 7 Taunt. 439; 4 Moore 133, S. C.; *Hoare* v. *Allen*, 2 Dal. 102; *Conn* v. *Penn*, 1 Pet. C. C. 523; *Denniston* v. *Imbrie*, 3 Wash. C. C. 396; *Billgery* v. *Branch*, 8 Am. Law Reg. (N. S.) 334. A single exception is

where bills are drawn by prisoners of war for subsistence or for their ransom; *Antoine* v. *Moorhead*, 6 Taunt. 237; Vattel, Droit des Gens, B. 3, Ch. 16, sec. 264; *Cornu* v. *Blackburne*, Doug. 641; *Yates* v. *Hall*, 1 T. R. 73; *Goodrich* v. *Gordon*, 15 Johns. 6; *Griswold* v. *Waddington*, 16 Johns. 451; *Kershaw* v. *Kelsey*, 100 Mass. 561. But, *contra*, see *Havelock* v. *Rockwood*, 8 T. R. 269; *Potts* v. *Bell*, Id. 548. It is also unlawful for one having goods in an enemy's country, at the outbreak of war, to withdraw them to the country of the owner; certainly, unless it be done promptly. If left an unreasonable time, they become impressed with the character of enemy's goods, and are lawful prize: *The Rapid*, 8 Cranch 155; *The Wm. Bagaley*, 5 Wal. 377; *The Hampton*, Id. 372. So, the contract of partnership is dissolved, or, at least, suspended, by the state of war: *Griswold* v. *Waddington*, 15 Johns. 57; s. c., on appeal, 16 Johns. 438; *The Wm. Bagaley*, 5 Wal. 377. It is unlawful to complete contracts with an enemy after war breaks out. To this rule the following case was held to be an exception. Where A. contracted with B. to deliver to him lumber, and war supervened between their respective countries, before the contract was fully executed, held, that B. might pay a balance due for lumber delivered, in pursuance of the contract, in B.'s own country, to A.'s agent residing there, although such delivery took place after the war broke out: *Buchanan* v. *Curry*, 19 Johns. 137. It could not benefit the enemy that A. delivered the lumber here; and, though it might benefit him if the price paid were to be transmitted to him by his agent, still it must be presumed it would not be so transmitted, but that the agent would retain it here while the war lasted. On the same principle it has been held, that it is not unlawful to pay a debt to an enemy, *flagrante bello*, provided it be paid to him personally in the debtor's country, or to an agent authorized to receive it residing there, but appointed before the war. See *Conn* v. *Penn*, 1 Pet. C. C. 524–5; *The United States* v. *Grossmayer*, 9 Wal. 72.

It is unlawful to correspond with an enemy by letter: *Griswold* v. *Waddington*, 16 Johns. 473, referring to the action of the Continental Congress in June 1778, and citing from its Journal, vol. 4, p. 254; so, doubtless, would it be to use for any private unlicensed purpose the telegraph, carrier pigeons, balloons, signals, or communications in newspapers, directed to, or intended to reach, an enemy.

From the same principles, it follows, that interest ceases to accrue upon contracts during the continuance of a war between the countries of the parties to them: *Hoare* v. *Allen*, 2 Dal. 102; *Foxcraft* v. *Nagle*, Id. 132; *McCall* v. *Turner*, 1 Call 133; *Brewer* v. *Hastie*, 3 Call 22; *Paul* v. *Christie*, 4 H. & McH. 161; *Conn* v. *Penn*, 1 Pet. C. C. 523; *Denniston* v. *Imbrie*, 3 Wash. C. C. 396; *Ward* v. *Smith*, 7 Wal. 447; *Bigler* v. *Waller*, 3 Chicago Leg. News 26; *Yeaton* v. *Berney*, Id. 82; *Tucker* v. *Watson*, 6 Am. Law Reg. (N. S.) 220. So, statutes of limitation are suspended as to such contracts: *Wall* v. *Robson*, 2 N. & McC. 498; *Moses* v. *Jones*, Id. 259; *Nicks* v. *Martindale*, Harper (S. C.) 138; *Ogden* v. *Blackledge*, 2 Cranch 272; *Hopkirk* v. *Bell*, 3 Cranch 54; *Hanger* v. *Abbott*, 6 Wal. 532; *Jackson Ins. Co.* v. *Stewart*, 6 Am. Law Reg. (N. S.) 732; *Conn. Ins. Co.* v. *Hall*, 7 Am. Law Reg. (N. S.) 606; *Semmes* v. *Ins. Co.*, 8 Am. Law Reg. (N. S.) 673. To the rule respecting interest there are some exceptions:— Where the hostile creditor resides in the debtor's country, or has an agent there authorized to receive the debt; and where the debt was made payable at a particular place in the debtor's country,

and the debtor has failed to pay, or to offer to pay, there, at maturity, interest will be allowed, although a state of war has intervened. See the cases cited above as to interest. It is presumed the rule would be, to some extent, the same in regard to statutes of limitation. They would, doubtless, not be suspended, were the enemy debtor or creditor residing here under a license, and so capable of suing or being sued upon the contract. See the cases cited below. Also *Braun* v. *Saurwein*, 10 or 11 Wal. It has long been settled that an alien enemy, resident in his own country, can neither sue nor be sued in the tribunals of the country with which his own is at war: *Crawford* v. *The Wm. Penn*, 3 Wash. C. C. 106; *Wilcox* v. *Henry*, 1 Dal. 69; *Mumford* v. *Mumford*, 1 Gal. 366; *Bell* v. *Chapman*, 10 Johns. 183; *Johnson* v. *Decker*, 11 Johns, 418; *Society* v. *Wheeler*, 2 Gal. 105; *The Emulous*, 1 Gal. 563; *Brandon* v. *Nesbit*, 6 T. R. 23; *Bristow* v. *Lowers*, Id. 35; *Potts* v. *Bell*, 8 T. R. 548; *Semmes* v. *Ins. Co.*, 8 Am. Law Reg. (N. S.) 673; *The Hoop*, 1 C. Rob. Adm. 200; *Hanger* v. *Abbott*, 6 Wal. 532. But see, *contra*, *Dorsey* v. *Kyle*, 30 Md. 512; *Dorsey* v. *Dorsey*, Id. 522; *Mixer* v. *Sibley*, 1 Chicago Leg. News 297. And where a suit had been commenced, and was, at the outbreak of the late war, pending between persons who became enemies thereby, the jurisdiction of the court ceased when the war broke out; and it could enter no order by which the rights of the non-resident defendant could be affected: *Livingston* v. *Jordan*, Am. Law Reg. for Jan. 1871, 53, *per* CHASE, C. J., Supreme Court U. S. But, if the alien enemy reside here at the outbreak of the war, or come hither to reside, *flagrante bello*, under an express or implied license from the government, he may sue or be sued here as in peace: *Clarke* v. *Morey*, 10 Johns. 69. Compare *Buckley* v. *Lyttle*, 10 Johns. 117; *Owens* v. *Hannay*, 9 Cranch 180; *Hamersley* v. *Lambert*, 2 Johns. Ch. 508.

The late rebellion of the Southern States was a war, within the meaning of the law of nations, and was followed by the same legal consequences as any other war: *The Prize Cases*, 2 Black 666; *The Venice*, 2 Wal. 258; *Mrs. Alexander's Cotton*, Id. 404; *Mauran* v. *Ins. Co.*, 6 Id. 1; *The Ouachita Cotton*, Id. 521; *Hanger* v. *Abbott*, Id. 532; *Coppell* v. *Hall*, 7 Id. 542; *McKee* v. *U. S.*, 8 Id. 163; *U. S.* v. *Grossmayer*, 9 Id. 72.

According to the principal case, the fact that an alien enemy has property here, subject to a mortgage lien or to seizure by foreign attachment under a state law, does not exempt him from the operation of the rule, that he cannot be sued in our courts. Notice to him of the pendency of such a suit must be either by a communication sent to him personally, or by an advertisement directed to him in a newspaper. The former, no court would think of sustaining as a valid notice; and the latter, in substance the same, or worse, is held in the principal case to be illegal and void, and so giving no jurisdiction to the court. This question seems first to have arisen in the Superior Court of Chicago, in 1867, in two cases; one, where a decree of foreclosure had been entered, during the war, against a Confederate enemy, upon notice by publication in a newspaper; and the other, where lands had been sold upon execution in foreign attachment, on a similar notice to one who was a Confederate enemy. It was held by JAMESON, J., that the court acquired no jurisdiction to render the decree or the judgment, and that the defendant was in each case entitled to relief: *Conn. Ins. Co.* v. *Hall*, 7 Am. Law Reg. N. S. 606; *Sibley* v. *Mixer*, decided at the same time, but unreported. The latter case was taken by appeal to the Supreme Court of Illinois, and the decision of the court below reversed.

The same point arose in Maryland, in 1869, in two cases, of which the facts were similar to those in the two last cited, and it was held, that the newspaper notices, published, one in pursuance of a law of Maryland, and the other, in pursuance of an order of court, directing the publication of the same, were sufficient to give jurisdiction to the court: *Dorsey* v. *Kyle*, 30 Md. 512; *Dorsey* v. *Dorsey*, Id. 522. In neither of these Maryland cases does it appear that the fact of the hostile character of the defendant was made known to the court below. In *Mixer* v. *Sibley*, the Illinois case, on the contrary, the fact that the defendant in attachment was an enemy within the Confederate lines, appeared in the affidavit upon which the writ was issued. It is difficult to see upon what principle this decision can be sustained. It seems, that such a judgment ought to be held void even in a collateral proceeding; for, the effect of the existence of a state of war, by the law of nations, as well as by the Act of Congress of July, 1861, was unquestionably to suspend all state laws permitting acts and proceedings inconsistent therewith, or with the state of war. Could the Illinois legislature empower the citizens of that state to trade or correspond with, or, at pleasure, to go to, or come from, or in any manner whatever communicate with, a public enemy? And it is no answer to intimate, as do the court in *Mixer* v. *Sibley*, with some severity, that no case can be found in the books sustaining the position taken by the court below in that case. If it be conceded, that, before the late war, no such case could be found, it does not follow that the rule may not be as stated. It may be, that no creditor ever before sought to abuse the process of the courts for such a purpose—a purpose that could hardly ever be consummated without rank injustice—or, it may be, that no court ever before ventured to deny the rule established by the principal case. Besides, the affirmation so frequently met with in our reports, that "no such case can be found in the books," if it do not turn out to be a mistake, so rarely rests on a thorough study of the books, that it is generally not entitled to much weight. How the case is here, may be inferred from the fact that the whole tenor of the only authority cited in *Mixer* v. *Sibley* on this point—the decision of the Supreme Court of the United States in the case of *The Rapid*, 8 Cranch 155—is misstated by the court, certainly through inadvertence—the learned judge who delivered the opinion citing, as employed by the court, language which was used only in argument by the counsel beaten in the case, and the doctrine involved in which was repudiated, and the very contrary announced, in the energetic terms quoted in the opening part of this note, by JOHNSON, J., who rendered the decision.

In 1870, a different, though analogous, question arose in the District Court for the Southern District of New York, touching the validity of a sale under a power in a trust deed, as against one who was, at the time, an enemy within the Confederate lines, when such sale was made, as provided in the deed, upon a notice to the donor of the power by publication in a newspaper. It was held by BLATCHFORD, J., that the sale was invalid—the notice, upon the principles since established in the principal case, being held to be absolutely void: *The Kanawha Coal Co.* v. *The Kanawha and Ohio Coal Co.*, published in pamphlet. The same point arose, in the Supreme Court of the District of Columbia, in the case of *Green* v. *Alexander*, 3 Chicago Leg. News 123, and, upon the authority of the former case, was decided by MCARTHUR, J., in the same way.

In the case of *Harper* v. *Ely*, decided by WILLIAMS, J., in the Chicago Circuit Court, in 1870, it was held, that if it

appeared that the defendant who was seeking to redeem from a sale of his property made upon a notice published in a newspaper, while he was an enemy within the Confederate lines, had voluntarily gone thither from a Northern State to assume the hostile character, relief would be denied. While a person choosing to become a traitor, and leaving the North for that purpose, would be morally more culpable than one who, residing at the South, should have been driven into treason, perhaps, by overwhelming force, it is not clear that a different rule should be applied to the two, unless, perhaps, it should appear that the purpose of assuming the hostile character was to oust the court of jurisdiction. Why should a harder measure of justice be meted to a traitor becoming such voluntarily north, than to one becoming such in like manner south, of a given line? The facts are not very fully stated, but it seems that the defendant's family went from Illinois, after the outbreak of the war, to reside in Kentucky, but that the defendant himself, before the war, went from one of the western territories to a Southern State, where he afterwards joined the rebel army, voluntarily, as he admitted, and from a sense of duty. If these were the facts, the hypothesis of his having voluntarily gone South to enter the rebel army, was unfounded, and it is still harder to accept the decision as authoritative: *Harper* v. *Ely*, 2 Chicago Leg. News 350, with which compare *Mrs. Alexander's Cotton*, 2 Wal. 404, 419, in which the court declare, that the personal dispositions, that is, I suppose, the political sympathies, of parties will not be inquired into, in questions of capture, but rather their domicil or residence.

The question, to what remedy a party is entitled, who is aggrieved by a wrongful assumption of jurisdiction, in this class of cases, is not always an easy one to answer. If, as in *Mixer* v. *Sibley*, the error appeared on the record, it might be corrected, upon writ of error, in the appellate court, if the writ were sued out in apt time. But where, as seems to have been true in the Maryland cases, the record did not show to the lower court the hostile character of the party proceeded against, the judgment or decree would, on its face, appear to be valjd, and would doubtless be so held on appeal—unless, indeed, the facts were admitted in the appellate court, and a decision invoked, as though they appeared of record. To reverse such a judgment, the injured party must have recourse to a bill in chancery, as, a bill in the nature of a bill of review, or a bill to redeem, or to some other proceeding appropriate, under the circumstances, according to the local law.

J. A. J.

Supreme Court of the United States.

THE STATE OF TEXAS *v.* WHITE ET AL.

THE STATE OF TEXAS *v.* RUSSELL, EXECUTOR, ET AL.

An attorney or solicitor, who is also counsel in a cause, has a lien on moneys collected therein for his fees and disbursements in the cause, and in any suit or proceeding brought to recover other moneys covered by the same retainer.

If the attorney is guilty of no bad faith or improper conduct, and claims to

have a fair set-off against his client, which the latter refuses to allow, a motion to pay into court the moneys collected will not be granted, but the parties will be left to their action.

A party has a general right to change his attorney, and a rule for that purpose will be granted, leaving to the attorney the advantage of any lien he may have on papers or moneys in his hands as security for his fees and disbursements.

In the first of these cases a motion was made for an order on George W. Paschal, lately counsel for complainant, to pay to the clerk of this court, for the benefit of complainant, the sum of $47,325 in gold, alleged to have been received by him under the decree in the case. In the other case motion is made that the name of said Paschal be stricken from the docket as counsel for the complainant, and that he be forbidden to interfere with the case. Rules to show cause having been granted, with leave to either party to file affidavits, the respondent, Paschal, at the return of the rules, filed a statement, under oath, by way of cause why the motions should not be granted.

T. J. Durant, for the motions.

A. G. Riddle, contrà.

The opinion of the court was delivered by

Bradley, J.—The application for an order on the respondent to pay money into court is in the nature of a proceeding as for a contempt. The application is based upon the power which the court has over its own officers, to prevent them from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice. For such improper conduct the court may entertain summary proceedings by attachment against any of its officers, and may, in its discretion, punish them by fine or imprisonment, or discharge them from the functions of their offices, or require them to perform their professional or official duty, under pain of discharge or imprisonment. The ground of the jurisdiction thus exercised is the alleged misconduct of the officer. If an attorney have collected money for his client, it is *primâ facie* his duty, after deducting his own costs and disbursements, to pay it over to such client; and his refusal to do this, without some good excuse, is gross misconduct and dishonesty on his part, calculated to bring discredit on the court and on the administration of justice. It is this misconduct on which the court seizes as a ground of jurisdic-

tion to compel him to pay the money, in conformity with his professional duty. The application against him in such cases is not equivalent to an action of debt or assumpsit, but is a quasi criminal proceeding, in which the question is not merely whether the attorney has received the money, but whether he has acted improperly and dishonestly in not paying it over. If no dishonesty appears the party will be left to his action. The attorney may have cross-demands against his client, or there may be disputes between them on the subject, proper for a jury or a court of law or equity to settle. If such appear to be the case and no professional misconduct be shown to exist, the court will not exercise its summary jurisdiction. And, as the proceeding is in the nature of an attachment for a contempt, the respondent ought to be permitted to purge himself by his oath. "If he clear himself by his answers," says Justice Blackstone, "the complaint is totally dismissed:" 4 Com. 288.

The answer of the respondent in this case sets forth the history of the litigation instituted for the recovery of the Texas indemnity bonds and the part taken by him therein, both in the two cases in which these motions are made and in other cases and proceedings. A portion of this history is published in the report of *Texas* v. *White*, 7 Wallace 700.

The answer admits that the respondent has received the sum alleged, viz., $47,325 in gold, paid under the decrees of this court, but alleges that his disbursements have been $13,355.98 (of which he gives an account by items), and that his charge for services is $20,000 in the case of *Texas* v. *White, Chiles et al.* alone, the reasonableness of which charge is corroborated by affidavits of highly respectable counsel, and the balance and much more he claims to be due to him from the state of Texas for his services in relation to others of this same lot of indemnity bonds, for the recovery of which he was originally retained by the governor of Texas, as well as for other matters specified in the answer, into the merits of which it is not necessary for us to go, inasmuch as neither party has asked this court to settle or liquidate the accounts between them. All that we are concerned to ascertain and decide on this motion is, whether the respondent retains the money in his hands in bad faith, and is therefore guilty of any such misconduct as will justify the court in interposing its authority in a summary way.

It appears by the answer that at the breaking out of the rebellion there were in the treasury of Texas seven hundred bonds of the United States, of $1000 each, belonging to the school fund of the state, and known as the Texas indemnity bonds, being part of the $5,000,000 of bonds delivered to the state at the time of its admission into the Union. These bonds had not been endorsed by any governor of the state, as was required to make them negotiable, but the military board nevertheless disposed of them for the purpose of aiding in carrying on the war. One hundred and thirty-six of these bonds came into the hands of White, Chiles, and Others; about one hundred and fifty came into the hands of Peabody & Co.; and various others into the hands of other persons. It was claimed by these parties that, having received the bonds in good faith, they were entitled to be paid their full amount by the government of the United States, and many of them were so paid. But it is claimed by the answer that, by the indefatigable exertions of the respondent payment was stopped on a large number of the bonds, and suits were instituted against the parties who had received them or had received the money secured by them. The respondent was employed by A. J. Hamilton, the provisional governor of Texas in 1865, to carry on these prosecutions. He first commenced a suit against White, Chiles, and Others, in Texas, but, not being able to serve them with process, he removed his operations to Washington, and there commenced the suit in which the money in question was recovered. He also took the proper steps and presented elaborate arguments in the Treasury Department to prevent a redemption of the bonds and to render the prosecution effectual, being partially successful in this object, as before mentioned. No stipulation was made with Governor Hamilton for any certain fee for these services, but it was understood between them that the respondent should charge such fees as the responsibility, expense, time, skill, and services should render proper. On the faith of this understanding the respondent left his home in Texas, where his practice was lucrative, and came to the North to attend to this business. For a time, on a change of local administration in Texas, other counsel were employed in the cases, but never, as it appears, to the entire displacement of the respondent; and in December 1867, he received the following special engagement from E. M. Pease, then Governor of Texas: "Executive of Texas, Austin, December 3d 1867, George W. Paschal, Esq.,

Dear sir: Your two letters of the 9th and 14th of November came together a day or two since. I had intended to write you before this, and ask you to make a thorough examination of the suit at Washington in behalf of the state against Chiles and Others for certain United States bonds belonging to the school fund of Texas, but a great press of business has prevented me from doing it. I now wish you to make such an examination, and make a full report thereon to this office as early as possible. In the mean time you are fully authorized to take charge of and represent the interest of the state in said suit. Your compensation will be dependent upon the action of a future legislature, unless a recovery is had in the suit, in which event I shall feel authorized to let you retain it out of the amount received. Yours, with respect, E. M. PEASE." The power of the governor to make such an arrangement is not disputed. The legislature, in October previous, had passed an act expressly authorizing the governor to take such steps as he might deem proper to recover possession of these bonds, and to compromise with the parties holding them or through whose hands they had passed. The respondent accepted these terms, and continued to manage and conduct the subsequent litigation, both in this case of White, Chiles, *et als.*, and other cases. In addition to the above letter, Governor Pease, on the 13th of November 1868, executed to the respondent a power of attorney, constituting him his agent and attorney in fact, to represent the state of Texas in any suits then pending or thereafter to be instituted in any courts in the District of Columbia in relation to any of the said bonds, with power to settle and compromise with any of the parties. Under these various retainers and engagements the respondent gave his attention for several years to the recovery of the bonds, and finally succeeded in recovering the amount before mentioned from the defendants in the case of White, Chiles and Others, and made considerable progress in negotiating a settlement of those which had come to the hands of Peabody & Co. In June 1869, Governor Pease visited Washington; and, on being made acquainted with the respondent's proceedings, approved of the same, and entered into a further arrangement with him in relation to three hundred of the said bonds which had been carried to Europe by one Swisher (of which the Peabody bonds were a part), by which he agreed that the respondent should be paid, for carrying the litigation through, twenty-five per cent. on the one hundred and forty-nine bonds received

by Peabody & Co., and twenty per cent. on the remainder, being one hundred and fifty-one bonds in the hands of Droege & Co. Under this arrangement the respondent continued his negotiations with these parties, and was, as he believed, near effecting a satisfactory arrangement and settlement with them, when, on or about the 27th of January 1870, he received a telegram from Edmund J. Davis, who had been appointed provisional governor of Texas in place of Governor Pease, that his appointment as agent for the state of Texas was revoked. A letter from the governor was received shortly after, containing a formal revocation of the respondent's authority as such agent and of the power to represent the governor of Texas given to him by Governor Pease. The respondent alleges that this interference on the part of Governor Davis put an end to the negotiations for a settlement with Droege & Co., and Dabney, Morgan & Co. (who had received the money on the Peabody bonds), and was entirely unauthorized by the governor, and entitles the respondent to receive the contingent fees of twenty-five and twenty per cent., as before mentioned, and to continue as attorney and counsel in the case until his demand is settled.

The respondent also claims that the state of Texas is indebted to him in a balance of $17,577 for publishing, binding, and delivering to the secretary of state of Texas four hundred copies each of five volumes of reports of the decisions of the Supreme Court of Texas, which he reported under the laws of the state. He also claims that the state owes him $1000 for bringing two suits in the District Court of Travis county, Texas, and prosecuting appeals therein to the Supreme Court of the state.

On the part of the state of Texas it is shown, not only that the governor revoked Mr. Paschal's authority, but that he has appointed Mr. Durant as attorney and agent of the state in his stead, with authority to receive all moneys due to the state; and that Mr. Durant has made due demand of Mr. Paschal for the moneys in his hands, and has required him not to intermeddle further in the suit of *Texas* v. *Russell, Executor of Peabody, et al.*

Upon a consideration of the facts disclosed by the answer and affidavits, the result to which the court has come, in relation to the money retained by the respondent, is, that he has not been guilty of any misconduct which calls for the exercise of summary jurisdiction. We see no reason to suppose that he is not acting in good faith; and whether his claim to the entire amount be

valid or not (a point which we are not called upon to decide), it is clear that the claim is honestly made. The case is one in which the parties should be left to the usual remedy at law, where the questions of law and fact which are mooted between them can be more satisfactorily settled than they can be in a summary proceeding.

A good deal has been said in the argument on the question whether the respondent has, or has not, a lien on the moneys in his hands. We do not think that the decision of this motion depends alone on that question. For, even if he has not a *lien* co-extensive with the sum received, yet if he has a fair and honest set-off, which ought in equity to be allowed by the complainant, that fact has a material bearing on the implied charge of misconduct which underlies the motion for an order to pay over the money; and when, as in this case, there exists a technical barrier to prevent the respondent from instituting an action against his client (for it is admitted that he cannot sue the state of Texas for any demand which he may have against it), it would seem to be against all equity to compel him to pay over the fund in his hands, and thus strip him of all means of bringing his claims to an issue. Whilst, on the other hand, no difficulty exists in the state instituting an action against him for money had and received, and thus bringing the legality of his demands to a final determination.

But in the judgment of the court the respondent has a lien upon the fund in his hands for at least the amount of his fees and disbursements in relation to these indemnity bonds. His original retainer by Governor Hamilton related to all the bonds indiscriminately, and much of the service rendered by him has been rendered indiscriminately in relation to them all. With regard to the White and Chiles bonds the agreement of Governor Pease was express, that in case of recovery the respondent might retain his compensation out of the amount received. In England, and in several of the states, it is held that an attorney or solicitor's lien on papers or money of his client in possession extends to the whole balance of his account for professional services. But whether that be or be not the better rule, it can hardly be contended that in this case it does not extend to all the fees and disbursements incurred in relation to all of these indemnity bonds. And in this country the distinction between attorney or solicitor and counsel is practically abolished in nearly all the states. The

lawyer in charge of a case acts both as solicitor and counsel. His services in the one capacity and the other cannot be well distinguished; and, as a general rule, counsel fees, as well as those of attorney or solicitor, constitute a legal demand, for which an action will lie. And whilst, as between party and party in a cause, the statutory fee bill fixes the amount of costs to be recovered, as between attorney or solicitor and client a different rule obtains. The claim of the attorney or solicitor in the latter case, even in England, extends to all proper disbursements made in the litigation, and to the customary and usual fees for the services rendered.

The fee bill adopted by Congress in 1853 recognises this general rule, and, in fact, adopts it. By the first section of that act it is expressly declared that nothing therein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective states, or may be agreed upon between the parties.

The change in the rule relative to fees and costs has been gradually going on for a long period. In Pennsylvania counsel fees could not be recovered in an action so late as 1819, when the case of *Mooney* v. *Lloyd*, 5 S. & R. 411, was decided. But in the subsequent case of *Foster* v. *Jack*, decided in 1835, 4 Watts 334, the contrary was held, in a very able opinion delivered by Chief Justice GIBSON. And in *Balsbaugh* v. *Fraser*, 19 Penna. 95, Chief Justice BLACK delivered the opinion of the court in a series of propositions which strongly commend themselves for their good sense and just discrimination. The court there held that in Pennsylvania an attorney or counsellor may recover whatever his services are reasonably worth; that such claim, like any other which arises out of a contract, express or implied, may be defalked against an adverse demand; that an attorney, who has money in his hands which he has recovered for his client, may deduct his fees from the amount; that if he retain the money with a fraudulent intent, the court will inflict summary punishment upon him; but if his answer to a rule against him convinces the court that it was held back in good faith, and believed not to be more than an honest compensation, the rule will be dismissed, and the client remitted to a jury trial.

In New York counsel fees have always been recoverable on a *quantum meruit: Stevens & Cagger* v. *Adams*, 23 Wend. 57; s. c., 26 Wend. 451. In this case Stevens recovered $300 for counsel fees and $50 for maps made to be used in a cause. It was held by the court that the fee bill, which declares it unlawful to demand or charge more than therein limited, has reference only to the question of costs as between party and party, and not as between counsel and client. The arguments of Chancellor Walworth and Senators Lee and Verplanck, in the court of errors, on the general subject, were exceedingly lucid and able, going to show that in this country the counsellor is regarded as entitled to a fair remuneration for his services, and to recover the same in an action, either upon an express or implied contract. The Code has since abolished the fee bill, and left attorneys and solicitors to make their own bargains with their clients. But the courts have held that this change has not affected the attorney's lien, even on the judgment recovered, for the amount which it has been agreed he shall receive. In one case he was to receive one-half the amount to be recovered. Judgment was obtained for $1179, and the court held that the attorney had a lien on this judgment for his half of it, and that the defendant could not safely settle with the plaintiff without paying him: *Rooney* v. *Second Avenue Railroad Co.*, 18 N. Y. Rep. 368.

In Texas the law has been held substantially the same. In the case of *Casey* v. *March*, 30 Texas 180, it was decided that an attorney has a lien on the papers and documents received from his client, and on money collected by him in the course of his profession, for the fees and disbursements on account of such claims, and for his compensation for his services in the collection of the money. If, as the respondent contends, this case is to be governed by the law of Texas, it is decidedly in favor of his lien, at least to the extent of his services and disbursements in relation to the indemnity bonds. (See the cases of *Kinsey* v. *Stewart*, 14 Texas 457; *Myers* v. *Crocket*, Id. 257; *Ratcliff* v. *Baird*, Id. 43; *Hill* v. *Cunningham*, 25 Texas 25.) As the original retainer was made in Texas, we are inclined to the opinion that the rights of parties are to be regulated by the laws of that state. But, if this be not the case, this court would be guided by what it deems to be the prevailing rule in this country; and, according to this rule, we are of opinion that the respondent has a lien on

the fund in his hands for his disbursements and professional fees in relation to the indemnity bonds; and that, in retaining the said fund for the purpose of procuring a settlement of his claim, he has done nothing to call for the summary interposition of this court.

The motion for an order to compel the respondent to pay to the clerk of this court the money received by him, is therefore denied.

The other motion we think should be granted. The respondent, as appears from his answer, was employed by Governor Pease to proceed with and carry through the litigation relating to the three hundred bonds in the hands of Peabody & Co. and Droege & Co., with a stipulation to receive twenty-five per cent. of the amount that might be recovered on one hundred and forty-nine of the bonds, and twenty per cent. of the amount to be recovered on the remainder. Granting it to be true that this contract was definitely concluded (although there seems to have been some uncertainty as to one part of it), it cannot be seriously claimed that the complainant is so fixed and tied up by the arrangement that it cannot change its attorney and employ such other counsel as it may see fit, always being responsible, of course, for the consequences of breaking its contract with the respondent. Whether in discharging him the state has made itself liable for the whole contingent fee agreed upon, or only for so much as the respondent's actual disbursements and services were worth up to the time of his discharge, or for nothing whatever, it is not necessary for us to decide. That question can be more properly determined in some other proceeding instituted for the purpose. The relations between counsel and client are of a very delicate and confidential character, and unless the utmost confidence prevails between them the client's interests must necessarily suffer. Whether in any case, in virtue of an agreement made, an attorney may successfully resist an application of his client to substitute another in his place, we need not stop to inquire. In this case one of the states of this Union is the litigant, and moves to change its attorney for reasons which are deemed sufficient by its responsible officers. It is abundantly able, and it must be presumed will be willing, to compensate the respondent for any loss he may sustain in not being continued in the management of the cause. The court cannot hesitate in permitting the state to appear and conduct its causes by such counsel as it shall choose to represent it, leaving the respondent to such remedies, for the redress of any

injury he may sustain, as may be within his power. Under the decision which we have just made in relation to the money in his hands, he will be able to retain that fund and any papers and documents belonging to his client until his claim shall be adjudicated in such action as the state may see fit to institute therefor.

An order to discharge the respondent as solicitor and counsel for the complainant in the second case will be granted.

No costs will be allowed to either party on these motions.

The subject of the lien of attorneys and counsel for fees will be found exhaustively discussed in the note to *Carpenter* v. *Sixth Av. Railroad Co.*, 1 Am. Law Reg. N. S. 410, and the right of counsel in the American states to sue for fees, in the note to *Kennedy* v. *Broun*, 2 Am. Law Reg. 357.

Supreme Court of Pennsylvania.

CATHARINE ALTER'S APPEAL.

Where two persons agreed to make mutual wills, but by mistake each signed the will of the other, and one died: *Held*, that he died intestate.

There being no will to reform, the legislature could not give a court power to establish it upon proof of the intent of the parties; such an act would be the divesting of a vested estate.

THIS was an appeal by Catherine Alter from the decree of the Register's Court of the county of Philadelphia.

The facts are stated in the opinion of the court, which was delivered by

AGNEW, J.—This is a hard case, but it seems to be without a remedy. An aged couple, husband and wife, having no lineal descendants, and each owning property, determined to make their wills in favour of each other, so that the survivor should have all they possessed. Their wills were drawn precisely alike, *mutatis mutandis*, and laid down on a table for execution. Each signed a paper, which was duly witnessed by three subscribing witnesses; and the papers were enclosed in separate envelopes, endorsed and sealed up. After the death of George A. Alter, the envelopes were opened, and it was found that each had, by mistake, signed the will of the other. To remedy this error, the legislature, by an act approved the 23d of February 1870, conferred authority upon the Register's Court of this county to take proof of the mistake and proceed as a court of chancery to reform the will of

George A. Alter, and decree accordingly. Proceedings were had, resulting in a decision of the Register's Court, that there was no will, and that the act to reform it was invalid, the estate having passed to and vested in the collateral line of kindred. From this decree an appeal has been taken by Catherine Alter. On this statement, the first inquiry is, was the paper signed by George A. Alter his will? Was it capable of being reformed by the Register's Court? The paper drawn up for his will was not a will in law, for it was not "signed by him at the end thereof," as the Wills Act requires. The paper he signed was not his will, for it was drawn up for the will of his wife, and gave the property to himself. It was insensible and absurd. It is clear, therefore, that he had executed no will, and there was nothing to be reformed. There was a mistake, it is true, but that mistake was the same as if he had signed a blank sheet of paper. He had written his name, but not to his will. He had never signed his will, and the signature where it was, was the same as if he had not written it at all. He therefore died intestate, and his property descended as at law. The difficulty lies not in the want of power of a Court of Chancery to reform a mistake in an existing will, where full equity power to that end is conferred by the law, but in the want of power to give an existence to that which had none before. And the objection to the validity of the act conferring the authority to decree the will, lies not in a want of power in the legislature to establish a will upon parol proof of the fact of making it, and of the intent to execute the proper paper, but in its want of power to divest estates already vested at law on the death of George A. Alter without a will. There being no will, it is evident that the effect of any subsequent legislation, call it by what name we may, is simply to divest estates. That this cannot be done is abundantly proved in *Greenough* v. *Greenough*, 1 Jones 494; *McCarty* v. *Hoffman*, 11 Harris 508; *Norman* v. *Heist*, 5 W. & S. 171; *Bolton* v. *Johnes*, 5 Barr 145; *Dale* v. *Metcalf*, 9 Barr 108; and other cases. The first two cases are directly in point, for it was held therein that the Act of Assembly validating wills where the testator had made his mark instead of signing his name, or expressly directing it to be signed for him, could not reach the case of a will so executed, where the testator had died before the passage of the Act.

The decree of the Register's Court is therefore affirmed.

Supreme Judicial Court of New Hampshire.

NASHUA LOCK COMPANY *v.* WORCESTER AND NASHUA RAILROAD COMPANY.

Where several common carriers are associated in a continuous line of transportation, and in the course of the business, goods are carried through the connected line for one price under an agreement by which the freight-money is divided among the associated carriers, in proportions fixed by the agreement; if the carrier at one end of the line receives goods to be transported through marked for a consignee at the other end of the line, and on delivery of the goods takes pay for transportation through, the carrier, who so receives the goods, is bound to carry them, or see that they are carried, to their final destination, and is liable for an accidental loss happening in any part of the connected line.

ASSUMPSIT to recover for ten cases of locks. Plea, the general issue. The cause was submitted on the following agreed state of facts:—

The cases were marked for Wiesbushhabatt & Co., New York, and were delivered to the defendants, as freight, at Nashua, N. H., to be transported over their road from Nashua to Worcester, Massachusetts, and there delivered to the Norwich and Worcester Railroad, to be forwarded by the usual course of transportation to New York city, and the entire freight from Nashua to New York was paid by the plaintiffs to the defendants.

The defendants are a corporation in New Hampshire and Massachusetts, owning and operating a railroad between Nashua and Worcester, which forms a connection with the Norwich and Worcester Railroad and the line of steamers across Long Island Sound to New York from Norwich, Connecticut, known as the "Norwich and New York Transportation Company." The road of the defendants extends from Nashua to Worcester; the road of the Norwich and Worcester Railroad extends from Worcester to New London, from which point the boats of the Steam Boat Company run to New York. The defendants are accustomed to receive freight at Nashua destined and directed to New York and to deliver it to the Norwich Railroad as aforesaid. By an arrangement among these corporations the price paid for freight forwarded from Nashua to New York over the line is divided among them in accordance with an agreement.

The cases were forwarded by the defendants and by the Norwich and Worcester Railroad and delivered to the Transportation Company, and by them put on board the steamer "City of Norwich," which came in collision with a sailing-vessel on the Sound, took fire, and with the cargo, including the ten cases, was consumed. The value of the steamer has been ascertained, and a *pro ratâ* share assigned to the plaintiffs, who have declined to accept it. In case judgment should be for the plaintiff, the value of the goods lost is to be determined by an auditor.

A. W. Sawyer, for the plaintiffs.

G. Y. Sawyer, for defendants.

PERLEY, C. J.—According to the agreed case the three corporations,

the Worcester and Nashua Railroad, the Norwich and Worcester Railroad, and the Norwich and New York Transportation Company, were engaged as common carriers in the business of transporting goods between Nashua and New York in a continuous line under an agreement by which they divided the price paid for transportation through in proportions fixed by the agreement. The agreement is not before us; but from the general statement of it in the case it must be inferred that the parties to it were mutually bound to transport goods on their connected line according to the direction given by the owner, when they were received for transportation in the usual course of the business by any one of the parties. In this case it would have been a violation of the agreement among the parties to the continuous line, if either the Norwich and Worcester Railroad or the Transportation Company had refused to receive and transport the goods towards their destination in the usual course of the business as they were marked and directed when they were received by the defendants.

The contract between the plaintiffs and defendants must be implied from the facts stated in the agreed case. There was no special agreement, written or oral, that the goods should be carried to New York, nor that the responsibility of the defendants should end on delivery to the Norwich and Worcester Railroad. The general question is whether the defendants undertook for the transportation of the goods through to New York, or only agreed to carry and deliver, or tender, them to the Norwich and Worcester Railroad.

Had the defendants corporate authority to contract for the transportation of the goods beyond their own line? We have no hesitation in holding that railroads may contract to carry goods and passengers beyond their own lines. They could not answer the main objects of their incorporation without the exercise of this power. They are laid out and established with reference to connections in business with other extended lines of transportation, and the power to contract for transportation over the connected lines is implied in the general grant of corporate authority. On this point the authorities are nearly unanimous. It has been held otherwise in Connecticut by the opinion of three judges against two: *Hood* v. *N. Y. & N. H. Railroad*, 22 Conn. 1; *Elmore* v. *The Naugatuck Railroad*, 23 Conn. 457; *The Naugatuck Railroad* v. *The Button Company*, 24 Conn. 468. But in a later case, *Converse* v. *The Norwich & N. Y. Transportation Company*, 33 Conn. 166, the court in that state have shown some disposition to recede from the doctrine of their earlier cases. No other authorities are cited by the defendants to this point, and I have found no others that sustain their view of this question. The authorities the other way are numerous and decisive: *Muschamp* v. *The Lancaster & Preston Railway*, 8 M. & W. 421; *Weed* v. *The S. & S. Railroad*, 19 Wend. 524; *The F. & M. Bank* v. *The Ch. Transportation Company*, 23 Vermont 186; *McCluer* v. *M. & L. Railroad*, 13 Gray 124; *Rogers* v. *R. & B. Railroad*, 27 Vermont 110; *Wilcox* v. *Parmelee*, 3 Sandf. 610; *Perkins* v. *The P. S. & P. Railroad*, 47 Maine 573; and railroads may contract for transportation beyond the limits of the states in which they are established: *McCluer* v. *The M. & L. Railroad*, 13 Gray 124; *Burtis* v. *B. & S. L. Railroad*, 24 New York 369; and when a railroad makes a contract for transportation beyond its own line it will be presumed

that it had authority to do it: *McCluer* v. *M. & L. Railroad*, 13 Gray 124.

In the agreed case it is said the goods were received to be *forwarded*, &c., and from this phrase an argument is drawn that the agreement of the defendants was to forward to the next party in the line and not to carry through to New York. But here was no express agreement in any particular terms, and we are not called on to interpret the language used in any contract. The nature of the undertaking must be inferred from the facts stated in the agreed case, and cannot be determined by the phrase used in stating them. Even in a written contract, where the term *forwarded* is used, if the thing to be done belongs to the business of a carrier, he will be charged as such. In *Wilcox* v. *Parmelee*, 3 Sandf. 610, the court say: "The criticism of the defendant on the word *forwarded* used in the contract is not just. It applies to the whole distance, as well to those portions of the route where other parties were owners of the vessels, as to that portion where he employed his own means of transportation. He was to forward the goods from New York to Fairport, not to Buffalo, which he now says was the terminus of his own immediate route. The words used by him can only mean that he was to carry or transport the goods, and whether in his own vessels or in those of others was perfectly immaterial to the plaintiff." In *Schroeder* v. *The Hudson River Railroad*, 5 Duer 55, the defendants gave a receipt for goods "to be *forwarded* per Hudson River Freight Train to Chicago;" and under this receipt it was held that the defendants were bound to *carry* the goods to Chicago. So, in the recent case of *Buckland* v. *The Adams Express Company*, 97 Mass. 124, the defendants were charged as common carriers, though they described themselves in the contract under which they received the goods, as "Express Forwarders." In the present case the undertaking of the defendants must be implied from the facts stated in the agreed case, and the particular language used in stating them is of no materiality.

Since the introduction of steam as the means of transportation by land and water, the general question raised in this case has been much considered in different jurisdictions, and there is no little confusion and contradiction of authority respecting the rule which shall govern the rights and liabilities of the parties, where goods are put in the course of transportation to distant places through connected lines associated in the business of common carriers. Where such lines are engaged in carrying passengers and their luggage the several parties to the continuous line incur, it would seem, the same liabilities for damage and loss of the luggage as in cases where they carry goods only: *Darling* v. *The Boston & Worcester Railroad*, 11 Allen 295; *Quimby* v. *Vanderbilt*, 17 New York 312; *Weed* v. *The Railroad*, 19 Wend. 534; *The Ill. Central Railroad* v. *Copeland*, 24 Ill. 332; *Ill. Central Railroad* v. *Johnson*, 34 Ill. 382.

In England and in several of the United States, it has been held that when a railroad or other common carrier receives goods marked or otherwise directed for a place beyond the carrier's own line, this alone is *primâ facie* evidence of a contract to carry the goods to their final destination, though the freight money for transportation through is not paid to the carrier that receives the goods, and though he is not shown to have any connection in business with other parties beyond his own

line: *Muschamp* v. *The Lancaster and Preston Railway*, 8 M. & W. 421; *Watson* v. *The Ambergate, Nottingam and Boston Railway*, 3 Law & Equity 497; *Collins* v. *The Bristol and Exeter Railway*, 11 Exchequer 790, s. c., 7 House of Lords Cases 194; *Coxon* v. *The Great Western Railway*, 5 Hurlstone & N. 274. These and several other cases show that in England, after the fullest discussion in all the courts, the rule is firmly established that a carrier who receives goods marked for a place beyond his own line is *primâ facie* bound to carry them as directed to their final destination, and it is there held that the contract in such case is entire, and with the first carrier alone; that until some connection in the business, which has the general nature, if not the technical character, of a partnership, appears between him and the subsequent carriers, no action can be maintained against them by the owner, though the goods were lost or damaged on their part of the route.

I have not met with an American case, in which the rule has been pressed to the extent of holding that the owner cannot come on any carrier, by whose default the loss or damage actually happened. There are, however, numerous authorities in the United States for the general rule of *Muschamp* v. *The Railway*, that the receipt of goods marked for a place beyond the line of the carrier who receives them, implies a contract to carry them to their final destination, though no connection in business is shown with other carriers beyond, and though the price for transportation through is not paid in advance.

In *Foy* v. *The Troy & Boston Railroad*, 24 Barb. 382, the doctrine of the case is stated in the head note to be that "where a railroad company receives for transportation property addressed to a person at a point beyond the terminus of the road, he will be understood, in the absence of any proof to the contrary, to have agreed to deliver the property in the same order and condition in which it was received, to the consignee." The court say, "it was no part of the plaintiff's business to inquire how many different corporations made up the entire line of road between Troy and Burlington, or, having ascertained this, to determine at his peril, which of said companies had been guilty of the negligence which resulted in the injury to his wagon." In *Schroeder* v. *The Hudson River Railroad*, 5 Duer 55, the agent of the defendants gave the following receipt at New York: "Received of Schroeder six boxes—to be forwarded per Hudson River Railroad freight train to Chicago, Illinois;" and it was held that the defendants under this receipt were bound to transport the goods to Chicago. No connection in business with other carriers was relied on. In *Kyle* v. *The Laurens Railroad*, 10 Rich. (Law) 282, the rule of *Muschamp* v. *The Railway* was approved. O'NEALL, J., says: "The case of *Muschamp* v. *The Lancaster & Preston Junction Railway* states, I think, the true rule." The rule of *Muschamp* v. *The Railway* was approved and adopted in the *Central Railroad* v. *Copland*, 24 Illinois 332, in which it was held that "a railroad corporation selling tickets through over its own and other roads is liable for the safety of passengers and their baggage to the point of destination." The case was put on the same ground as when goods are received marked for a place beyond the line of the carrier that receives them. The court say: "We are inclined to yield to the force of the reasoning of the English courts, on principles of public conveni-

ence, if no other, and to hold when a carrier receives goods to carry marked for a particular place, he is bound to carry and deliver at that place. By accepting the goods so marked he impliedly agrees so to do, and he ought to be answerable for that loss." In the later case of *The Central Railroad* v. *Johnson*, 33 Illinois 382, it was decided in the same state that "when a carrier receives goods to carry marked for a particular place, he is bound under an implied agreement from the mark or direction to carry to and deliver at that place, though it be a place beyond his own line of carriage." In *The Detroit & Milwaukee Railroad* v. *The F. & M. Bank*, 20 Wis. 122, the railroad gave a receipt for the goods directed to New York, but the receipt provided that the railroad should not be liable beyond their own road, and it was held that by an express agreement a carrier might limit his liability to his own road, when he receives goods marked for a place beyond it. The road was in that case discharged upon the ground of an express agreement that it should not be liable beyond its own line, from which the inference is plain that, in the absence of an express agreement controlling the contract otherwise implied from the receipt of the goods marked for a place beyond its line, the road will be liable for a loss happening beyond. In *Angle* v. *The Mississippi & Missouri Railroad*, 9 Iowa 487, it was decided that "when a common carrier receives goods marked for a particular place beyond the *terminus* of his route, unaccompanied by any direction as to their transportation and delivery except such as may be inferred from the marks, he is *primâ facie* bound to carry and deliver them according to the marks."

St. John v. *Van Santvoord*, 25 Wend. 660, is a strong authority for the rule that when goods are received by a carrier marked for a place beyond his line, he is bound to carry them to their final destination, if there is nothing to control the contract implied by the receipt of the goods so marked. NELSON, C. J., delivering the opinion of the court, says: "It appears to me such a contract is fairly to be inferred from the receipt of the captain in the absence of any explanation. The box was directed to J. Petrie, Little Falls, Herkimer county, indicating plainly to whom the plaintiffs were desirous of sending it, and was delivered on board for the express purpose of transhipment to him; and without any qualification or explanation the agent received the article and gave his receipt, in effect saying to the plaintiff, I will take and deliver it at the place of destination according to the direction. So the plaintiffs must have understood the contract. It is the plain interpretation of the transaction. If the defendants had intended to limit their duty as common carriers short of the place of destination, they should in some way have indicated to the plaintiff this intent." The judgment of the Supreme Court in this case was reversed by the Senate, 6 Hill 157, upon the ground that the court should have received evidence of a custom controlling the general effect of the receipt of the goods marked for the place of destination, though the custom was not known to the plaintiff; leaving the doctrine untouched that the receipt of the goods so marked in the absence of evidence to explain and control the transaction would imply an agreement to carry to the place for which they were marked.

The American authorities above cited sustain the doctrine of *Muschamp* v. *The Railway*, that when a carrier receives goods marked for

a place beyond his own line, he is, *primâ facie* and in the absence of other evidence, bound by an implied contract to carry the goods to the place for which they are marked, though he has no connection in business beyond his own line and though he does not receive pay for transportation through.

There is another class of American cases which hold that the mere receipt of goods marked for transportation beyond the line of the party that receives them is not evidence of a contract to carry beyond his own line, if he has no connection in business with carriers beyond; but that, if several carriers associate in a continuous line, carry goods for one price through, and divide the freight-money among them in an agreed ratio, though they may not be technically partners, but only *quasi* partners, yet as to third persons who intrust goods to them for transportation they are jointly liable for a loss that happens in any part of the continuous line, though the freight-money is not paid to the first carrier on delivery of the goods to him.

In *Champion* v. *Bostwick*, 11 Wend. 571, s. c., 18 Id. 174, several proprietors of different sections in a connected line of stage coaches divided the receipts of the whole route in proportion to the miles run by each; and it was held that they were jointly liable as partners for an injury to a third person, not a passenger, caused by the negligence of one of them. It is to be observed that in this case the receipts of the way as well as the through travel were brought into the account; and on this, a distinction has been taken between that case and one where the receipts of the through travel only are divided; and for that reason it has been said that in a case like the present there is no partnership and no joint liability. But as to parties who deal with the through line, it is of no consequence how the other business is managed, or whether any other business is done by the associated carriers. At most the distinction is merely technical and has no substance. Nor am I acquainted with any legal principle to prevent one engaged in a general business from having a partner in one distinct part of it, like the through business in this case, without bringing all his business of the same kind into the partnership account. I take it to be no uncommon thing for a trader to have a partner in his business done at one place, who has no concern in his business of the same kind transacted at other places; for attorneys to form partnerships limited to certain parts of their business, and merchants, in the voyages, or in a single voyage, of one ship.

Hart v. *The Rensselaer & Saratoga Railroad* is to the point that "where three separate railroad companies owning distinct portions of a continuous railroad route between two termini run their cars over the whole road, employing the same agents to sell passenger tickets, and receive luggage to be carried over the entire road, an action may be maintained against any one of them for loss of luggage received at one terminus to be carried over the whole road." SMITH, J., delivering the opinion of the court in *McDonald* v. *The Western Railroad*, 34 New York 501, 502, says: "We may judicially take notice of the fact that the vast business of inland transportation of goods is carried on mainly upon routes formed by successive lines belonging to different owners, each of whom carries the goods over his own line and delivers them to the next. Many of these routes extend over thousands of

miles. Their proprietors unite and receive goods for transportation *upon the promise express or implied* that they shall be carried safely to the place of delivery. The owner has lost sight of his goods when he delivers them to the first carrier and has no means of learning their whereabouts till he or the consignee is informed of their arrival at the place of destination."

In *Wibert* v. *The Erie Railroad*, 12 New York 256, it was said that "where a carrier is in the habit of receiving and forwarding goods directed to any particular place, an agreement on his part to take them there has been presumed; but where these operations are entirely disconnected, there is no partnership." In *Bradford* v. *The Railroad Company*, 7 Rich. (Law) 201, it was held that "an advertisement of a through line and the course of the business is evidence to charge all the roads engaged in the continuous line of transportation as jointly liable for carriage through the whole route." REDFIELD, C. J., in delivering the opinion of the court in *The F. M. Bank* v. *The Transportation Company*, 23 Vermont 131, speaking of *Weed* v. *The S. & S. Railroad*, 19 Wend. 534, says, "that case is readily reconciled with the general rule that such carrier is only bound to the end of his own route, by the consideration that in this case there was a *kind of partnership connection* between the first company and the other companies constituting the entire route, and also that the first carrier took pay and gave a ticket through, which is most relied on by the court; and in such cases where the first company gives a ticket and takes pay through it may be fairly considered equivalent to an undertaking to carry throughout the entire route." In a note to this case by REDFIELD, C. J., he says, "in that case (*Weed* v. *The Railroad*) the court seem to put the case more upon the fact of taking fare and giving a ticket through, which in practice is seldom or never done except where there is a *quasi partnership* throughout the route." This would seem to be a strong authority that where there is a connected line of carriers, and a *quasi*, though it may not be technical and legal partnership, they are liable jointly for carriage through the whole connected route.

By the statute of New York, enacted in 1847, "whenever two or more railroads are connected together any company owning either of said roads receiving freight to be transported to any place in the line of either of said roads shall be liable as common carriers for the delivery of such freight at such place." This statute has received a liberal construction and been held to make a railroad in New York liable for a loss on a road in the connected line beyond the limits of the state: *Burtis* v. *The Buffalo and State Line Railroad*, 24 New York 269; but not to discharge an intermediate carrier for loss caused by his own fault: *Smith* v. *The N. Y. Central Railroad*, 43 Barb. 225.

In *The Cincinnati H. & D. Railroad* v. *Speat*, 2 Duval 4, it was decided that "where several parties are associated for the transportation of freight from Louisville to New York, executing through bills of lading and charging through freight, they will be chargeable as common carriers between those points; and in such cases public justice and commercial policy require a stringent construction against any intermediate irresponsibility as common carriers." Two points were decided in this case: that the defendants were liable as common carriers for transportation through to New York; and that on the facts of the case they held

the goods as common carriers and not as warehousemen. The court say: "The facts conduce to prove that the appellants, associated as they were with steamboats and other carriers from Louisville to Cincinnati as joint transporters between those points, and jointly charging through freight and giving through receipts, were in the popular and technical import common carriers to the whole extent between those termini." This reasoning applies with full force to the present case.

In 2 Redfield on Railways 104, the learned author sums up the result of the American cases on this particular point as follows: "The American cases upon the subject, with rare exceptions, recognise the right of a railroad company to enter into special contracts to carry goods beyond the line of their road; and *where different roads are united in one continuous route* such an undertaking, when goods are received and booked for any part of the line, is almost a matter of course." In the present case the defendants were united in a continuous line to New York; the goods were received *marked*, which must be equivalent to *booked*, for New York; and the case would seem to fall clearly within the rule laid down in Redfield as the result of the American authorities.

There is still another class of cases, in which it is held that the fact of a carrier's receiving pay for transportation to a place beyond his own line implies a contract to carry to that place. In the case of *Hyde* v. *The Trent & Mersey Navigation Company*, 5 T. R. 389, decided in 1793, the marginal note is as follows: "Common carriers from A to B, charge and receive for cartage to the consignee's house at B from a warehouse there, where they usually unloaded, but which did not belong to them; they must answer for the goods if destroyed in the warehouse by an accidental fire, although they allow all the profits of the cartage to another person, and that circumstance were known to the consignee." The four judges delivered their opinions seriatim and all agreed that the charge for cartage to the house of the consignee "put the case out of all doubt," and bound the carriers who made the charge, to carry the goods to their final destination. In answer to the argument that the carriers acted as agents of the owner in forwarding the goods beyond their own line, Mr. Justice BULLER said: "According to the defendants' own argument great inconvenience would result to the public from adopting the other rule. According to their argument there must be two contracts, where goods are sent by coach or wagon. But I think the same argument tends to establish the necessity of three; one with the carrier, another with the innkeeper, and a third with the porter. But in fact there is but one contract; there is nothing like any contract or communication between any other person than the owner of the goods and the carrier. But I rely on the charge which the defendants compelled the plaintiff to pay before they would engage to deliver the goods. The different proprietors may divide the profits among themselves in any way they choose, but they cannot exonerate themselves from their liability to the owner of the goods." This case, coming before the agitation of these questions on the introduction of steam as a motive power, and decided on the general principle applicable to the liability of carriers at common law, is certainly of very great weight. It decides that when a carrier receives goods to be transported beyond his own line and takes pay for carrying them to their final destination,

he agrees to do what he has been paid for doing; and it repudiates the fanciful theory of an agency for the owner to forward the goods and in his behalf procure them to be carried by others.

In *Weed* v. *The Saratoga & Schenectady Railroad*, 19 Wend. 534, the plaintiff's agent took passage at Saratoga in the Saratoga & Schenectady Railroad for Albany and paid his fare to Albany. The route to Albany consisted of the defendants' and the Mohawk & Hudson River Railroad. When the agent arrived at Albany his trunk containing money of the plaintiff was missing, and this action was brought to recover for the loss. One ground taken for the defendants was that there was no evidence the trunk was lost on their road. There was no evidence of a contract to carry to Albany except such as was implied from the fact that the two roads made a continuous line to Albany, and the defendants took the trunk for carriage to Albany and received the pay for carrying through. It was held that the payment and receipt of fare through bound the defendants as carriers over the other road through the whole continuous route.

Wilcox v. *Parmelee*, 3 Sandf. 610, is an authority to the same point, that receiving pay for transportation to a place beyond the line of the carrier who receives it, implies a contract to carry to that place. The court say.: "Besides, there is a fixed sum which covers the whole charge; and it would be absurd to suppose that the defendant was to receive the whole sum for merely forwarding, that is, placing the goods on the vessels of some other party to be carried to their place of destination."

Van Santvoord v. *St. John*, 6 Hill 157, cited for the defendants, recognises the doctrine of *Weed* v. *The Railroad*. In his opinion for reversing the judgment of the Supreme Court, the Chancellor says: "In the case of *Weed* v. *The Railroad* the two lines were connected together by an arrangement between themselves, and the agent of the defendant took the pay in advance for the conveyance of the plaintiff and his baggage the whole distance. Or, if no actual connection between the two lines was proved, it at least appeared that the defendant permitted its agent to hold it out as a carrier of passengers and their baggage for the whole distance *by taking pay therefor*." It thus appears that in *Van Santvoord* v. *St. John*, as in *Hyde* v. *The Navigation Company*, taking pay for carriage to a place beyond the line of the party that takes it, is regarded as decisive of an undertaking to carry to that place. *Quimby* v. *Vanderbilt*, 17 New York 315, is to the same point, that receiving pay for carriage through a continuous line imports a contract to carry through; and in *Burtis* v. *The Buffalo and State Line Railroad*, 24 New York 269, 278, SUTHERLAND, J., says: "It would appear to be settled by both the American and English cases that when from usage in the particular business, or *by receiving pay to the place* to which the goods are addressed, beyond the railway company's road, or from any other circumstance, it is to be presumed that the undertaking of the railway was to deliver at such place, they are responsible for the delivery of the goods at such place, and are liable if the goods are lost after leaving their road."

In *Choteaux* v. *Leach*, 18 Penn. St. Rep. 224, furs were shipped at Cincinnati for New York. The defendants admitted that they were carriers on the canals and railroads of Pennsylvania, but denied that

they were on the river Ohio. The furs were lost in a steamboat on that river. The court (BLACK, C. J.) say: "They, the defendants, received the full freight from Cincinnati to New York; and this is wholly inconsistent with the notion that they were agents for the shipment of the furs, and not carriers from Cincinnati to Pittsburgh, as well as on other parts of the route." To the same point is *The Baltimore & Philadelphia Steamboat Company* v. *Brown*, 54 Penn. 77, which cites and approves *The Illinois Central Railroad* v. *Copeland*, 24 Illinois 338; *The Illinois Central Railroad* v. *Johnson*, 34 Illinois 382, and *The Railroad* v. *Schwartzenburg*, 9 Wright 208. So in *Candee* v. *The Pennsylvania Railroad*, 21 Wis. 582, where a railroad sells a through passenger ticket by a specified route to some point out of the state over lines belonging to other companies, it seems the understanding of the first company is to transport the passenger and his baggage to such place of destination. *Carey* v. *The Cleveland & Toledo Railroad*, 29 Barb. 36, is to the same effect, and also *The Illinois Central Railroad* v. *Copeland*, 24 Illinois 332, in which it was held that a railroad selling tickets through over its own and other roads is liable for the safety of passengers and their baggage to the point of destination. *Wheeler* v. *The Railroad*, 31 Cal. 52, cites and apparently approves the doctrine as laid down on this point in 2 Redfield on Railways 109. In *Carter* v. *Peck*, 4 Sneed (Tenn.) 203, the defendants received fare and gave a ticket to a point beyond their own line; it was held that they were liable for a detention beyond their own line. HARRIS, J., delivering the opinion of the court, says: "When the defendants received the plaintiff's money and gave him a through ticket, they thereby became bound for his transportation over the entire line. The arrangement between the defendants and the proprietors of other portions of the line was a matter with which the plaintiff had nothing to do. He was no party to that arrangement, nor was he bound to look to any person for the performance of the defendant's undertaking but themselves."

Redfield (Railways 109) sums up the result of the authorities on this point as follows: "It has generally been considered, both in this country and in the English courts, that receiving goods destined beyond the terminus of the particular company and giving a check or ticket through does import an undertaking to carry through, and that this contract is binding on the company."

Then, again, there are American cases which maintain the doctrine that, though carriers are associated in a continuous line, and one of them, on receiving goods marked for transportation through, takes pay for transportation through, which by agreement of the parties to the continuous line is divided among them in a fixed proportion, yet, in the absence of a positive agreement, each carrier is liable for loss on his own line, and not for a loss on any other part of the connected line.

This appears to be the settled rule in Connecticut. In *Hood* v. *The New York & New Haven Railroad*, 22 Conn. 1, the defendants' road was connected with a line of stage coaches which runs from their terminus to Coleville; and they advertised that passengers by their line went by stage from Farmington to Coleville. The plaintiff bought a ticket of the defendants at New Haven for Coleville. The conductor on the said road took up the plaintiff's ticket and gave him one for the stage. The plaintiff was injured on the stage route. The whole fare

through was paid to the defendants, and they accounted on settlement with the proprietors of the stage line, and this was according to the custom of the business. There was no other contract between the stage company and the railroad. It was held that there was no contract by the defendants to carry the plaintiff on the stage route. The decision would seem to have been put mainly on the ground that the defendants had no corporate authority to contract for carriage beyond their own line. In *Elmore* v. *Naugatuck Railroad*, 23 Conn. 457, it was decided that neither the receiving of goods directed to a point beyond the line of the road, nor an advertisement of the general facilities of transportation through the route is evidence of a special contract to carry goods to the place to which they were directed. *The Naugatuck Railroad* v. *The Button Company*, 24 Conn. 468, is to the same effect; and in the later case of *Converse* v. *The Norwich and Worcester Transportation Company*, 33 Conn. 166, the court consider the question as settled in Connecticut.

In Maine a single case is cited by the defendants, *Perkins* v. *The P. S. & P. Railroad*, 47 Maine 573 (and I have found no other in that state bearing on the present question), the head note of which is as follows: "A railroad company may be bound by special contract (but not otherwise) to transport persons or property beyond the line of their own road." It is to be observed that in this case of *Perkins* v *The Railroad*, the plaintiff had judgment, on the ground of a special contract; from which the negative inference is drawn that the plaintiff could not recover otherwise than by a special contract. This cannot be regarded as quite equivalent to a direct decision on the point; for if the point was raised in the case it certainly did not require the court to determine whether a special contract was necessary to charge the defendants, and besides there is reason to think that the term "express contract" could hardly have been used in its strict sense to signify a contract in the form of a direct promise or undertaking in language, oral or written, proper to show a positive agreement; since the judge, who delivered the opinion of the court, speaks of a case where the carriers would be liable on the ground that they "held themselves out as common carriers to that place;" in which case, as I understand it, the contract would not be express, in the strict or usual sense of the term, but implied from the conduct of the party. And the same learned judge also says: "It is of great public convenience, if not absolute necessity, that several companies should combine their operations, and thus transport passengers and merchandise by a mutual arrangement over all their lines, upon one contract, for one price. In such cases each is held liable for the whole distance." Instances are to be met with in other books of a similar latitude in the use of the term *special contract*, as in 2 Redf. on Railways 104, where the term *special contract* is used, but the example given is of a contract implied from certain facts. For these reasons we are not inclined to regard *Perkins* v. *The Railroad*, as a direct and final decision by the courts in Maine of the question raised in the present case.

In *Nutting* v. *The Connecticut River Railroad*, 1 Gray 502, the Supreme Court of Massachusetts decided that "a railroad corporation receiving goods for transportation to a place beyond the line of their road on another railroad which connects with theirs, but with the pro-

prietors of which they have no connection in business, and taking pay for transportation over their own road only, are not liable, in the absence of any special contract, for loss of the goods after their delivery to the proprietors of the other road." This could hardly be regarded as an authority for the defendants in the present case; and I find nothing in the opinion of the court, which carries the doctrine of the case beyond the statement of the head note. But in later cases the rule has been established in Massachusetts that a carrier is not bound for the transportation of goods beyond his own line in the absence of a positive agreement to that effect. In *Darling* v. *The Boston & Worcester Railroad*, 11 Allen 295, it was decided that if an arrangement is made between several connecting railroad companies, by which goods to be carried over the whole route shall be delivered by each to the next succeeding company, and each company receiving them shall pay to its predecessor the amount already due for carriage, and the last one collect the whole from the consignee, a reception of such goods by the last company, and payment by it of the charges of its predecessors, will not render it liable for an injury done to the goods before it received them." From this case the general rule has been deduced in Massachusetts that a carrier is not liable for loss beyond his own line without a *positive agreement* to be so liable; though some of the discussion in *Darling* v. *The Railroad* seems hardly consistent with such a rule, for the learned judge who delivered the opinion says "the usage as to the manner of doing the business enters into the contract as part of it, in the absence of an express contract. But the convenience of commerce makes it highly useful to send goods to distant places which can be reached only by independent lines of transportation. It is important that this business should be accommodated; and this may be done by express agreement or *established usage*. It is frequently done in this country by agreements made by the proprietors of connecting lines with each other; and this is much better than to leave any important matter of this kind to be settled by usage. When such arrangements are made the liability of each line is to be determined by a fair construction of their terms." That is to say, usage enters into the contract on which the goods are carried for the owner; but when the business is done on the connected line by an agreement among the parties to it, the liability of the different parties to the owner for the transportation of his goods is to be determined by a fair construction of the terms of the agreement among the parties to the connecting line; and the contract on which the goods are carried is inferred from usage, or from the arrangements among the parties to the connected line, and in such case does not depend on any positive agreement between the owner of the goods and any one of the carriers.

We have been furnished with a manuscript copy of the opinion in *Goss* v. *The New York, Providence & Boston Railroad*,[1] in which on facts that we cannot distinguish from the present, the court held that the point was settled by the prior decisions in Massachusetts, especially by the case of *Darling* v. *The Railroad*, and declined to discuss the general question further. And in the case of *Burroughs* v. *The Norwich & Worcester Railroad*, decided in September, 1868, we have also

[1] Since reported, 99 Mass. 220.

been furnished with the opinion of the court holding the law to be well settled in Massachusetts that a corporation established for the transportation of goods over a line between certain points and receiving goods directed to a more distant point is not responsible beyond the end of its own line, unless it makes a positive agreement extending its liability. And this rule, if a newspaper report can be trusted, was lately applied in *Pendergast* v. *The Adams Express Company*, by the same court to the case of an express company that gives a receipt for money directed to a place beyond the line of the company that gives the receipt.

It has been said that the English rule on this subject has not been generally adopted in this country. A review, however, of the American cases shows but too plainly, that if our courts have differed from the English, they are far from agreeing among themselves in any principle or doctrine that can be called the *American rule*. There is not only much confusion, but no little conflict in the American authorities. A large proportion of them are not directly in point for the present case, which must be decided on the facts found by agreement of the parties.

The following are the facts and circumstances from which the contract between these parties must be inferred:

The three corporations were engaged as common carriers in the transportation of goods in a connected line between Nashua and New York, under an agreement among the parties to the connected line.

In the present instance, and generally under the agreement, one price was paid for transportation through.

The freight-money was divided among the parties to the connected line in proportions fixed by their agreement.

The goods were received by the defendants for transportation on the connected line marked for New York.

The legal inference from the general statement of the agreement is that the parties to the continuous line were bound by their mutual contract to take from each other and carry through goods so marked, that might be received by any one of them.

The price for transportation to New York was paid to the defendants, when they received the goods.

The American authorities are comparatively few, which hold that when all these circumstances concur, the carrier who receives the goods is not bound, by an implied agreement, to carry them, or see that they are carried, over the connected line to their final destination. I do not find that the decisions in any of the states sustain this defence, except in Connecticut, Maine, and Massachusetts.

With regard to the cases in Connecticut, it cannot imply any want of the respect due to the courts of that state, if I say that for two reasons their cases on this point are not entitled to all the deference that is paid to their decisions on other subjects. In the first place, it is held there that railroad corporations have no corporate authority to contract for the transportation of goods or passengers beyond their own lines; a doctrine rejected everywhere else. If it were admitted that railroads had the power to make such contracts, it does not appear that the courts in Connecticut would have decided that the plaintiff in a case like this would not be entitled to recover. Indeed it would seem from the opinion of the court as delivered by Ellsworth, J., in *Elmore* v. *The Naugatuck Railroad*, 23 Conn. 457, that in Connecticut these defend-

ants would be held liable if their power to contract were conceded. He says "no money was paid, or agreed to be paid, for conveying the leather to any specific place. There was no evidence or claim that there was any connection between the defendants and the steamer, except in the customary way of forwarding freight they delivered the goods to each other from time to time as they were marked for transportation, no matter to what place, whether to New York, California, Europe, or Asia. It is obvious that where the different carriers throughout the route are connected in business by some joint undertaking or partnership, there can be no difficulty in case of a loss which happens on any part of the line; but the question arises, where this is not the case, what is the law then?" From this it seems to me that we are warranted in supposing, if the defendants had power to contract and the facts had been such as are found in the present case, the court in Connecticut would have no difficulty in charging the defendants for a loss happening in any part of the line. Then again these decisions in Connecticut were by three judges against two; WAITE, then Chief Justice, and HINMAN, who has since filled that place. The reasons for holding the defendants liable in *Elmore* v. *The Railroad* are very ably and forcibly stated by WAITE, C. J., in his dissenting opinion. Such dissent, it is evident, leaves the authority of the cases so much reduced that they cannot be entitled to great weight out of the jurisdiction in which they were decided.

The single case of *Perkins* v. *The P. S. & P. Railroad*, for reasons before suggested, we cannot consider as a final settlement of the question in Maine.

But in Massachusetts the court in a series of decisions have established the rule that a carrier, though associated with others in a connected line of transportation, is not liable for a loss happening beyond his own line without a positive agreement to that effect; and this rule is applied to the baggage of passengers, and the undertaking of express companies that receive goods for transportation beyond their own lines. The fact that notwithstanding the earlier decisions, suits have continued to be brought in that Commonwealth against parties that have received goods to be transported on continuous lines for losses happening beyond their own lines, might seem to suggest a suspicion that the profession and the public had not readily acquiesced in the rule as there laid down; but the court have adhered firmly to the rule, and in some of the later cases have apparently declined to enter on the discussion of the question, treating it as finally settled; and we must therefore consider the high authority of that court as against the right of the plaintiffs to recover in this action. So far, however, as that court may be understood to have established the rule that to bind a railroad for transportation beyond its own line there must be an express and positive agreement between the railroad and the owner of the goods, and that such an undertaking is not to be implied from facts such as are found in this case, the current of American authority, to say nothing of the English, appears to be strong the other way. Excepting the cases in Connecticut and Maine, which, when examined, do not, I think, give the Massachusetts doctrine any very strong support, the authorities in other states, though they differ much in other particulars, generally agree in this, that where, as in the present case, there is a continuous line of different carriers united

by an agreement under which they carry goods through the connected line for one price, which they divide among themselves in proportions fixed in their agreement, if one of the parties receiving goods to be transported on the continuous line, marked for any place in it, and on receiving the goods takes pay for transporting them to that place, the party so receiving the goods and the pay for transportation, is *primâ facie* bound by an implied agreement to carry the goods, or see that they are carried to the place for which they are marked, and is liable for a loss happening on any part of the connected line.

If the cause were to be considered on authority only, we should feel bound to decide for the plaintiffs, inasmuch as we find the weight of authority to preponderate heavily in their favor; and taking general principles and reasons of convenience and public policy for our guide, we are led to the same conclusion.

In the view which the plaintiffs ask us to take of this case, when the goods were received by the defendants, marked for transportation to New York, and the price paid to the defendants for transportation through on the continuous line, the plaintiffs made one contract with the defendants, by which the defendants agreed, either as joint carriers with the other associated parties, or as undertaking for them to carry the goods through for the price paid, as goods were carried in the usual course of the business on that line. In that view the plaintiffs would have nothing further to do in the matter. Everything else was provided for by the agreement among the associated carriers; for by their agreement the defendants were bound to transport and the successive carriers would be bound to take and carry the goods from each other to their final destination. The price through was paid, and belonged to the different carriers in proportions fixed by their agreement; and this theory would agree exactly with the facts; for the plaintiffs in fact made but one agreement with one party to have the goods carried for one price to New York. No further stipulation or direction on the part of the plaintiffs was necessary, and none was ever in fact given by owners of goods who put them in the course of transportation, as these were put, in the continuous line.

According to the defendants' theory of the case, when the plaintiffs delivered the goods marked for New York, and the defendants received them and took pay for transportation through, no contract was made with any party to carry the goods through; but the contract then made by the defendants was to carry the goods to the next carriers on the connected line with the surplus money, and as agents of the plaintiffs make a contract if they could with the next carriers to take the goods and the money and carry them on in the same way through successive agencies for the plaintiff to their final destination. If these agents should consent to act for the plaintiffs, and be able to negotiate bargains with the other carriers for transportation through, the goods would go to New York as was intended; but they would go under three separate contracts made at different times through this imaginary agency with three different and independent parties.

The first objection to the defendants' theory of this transaction is that it is contrary to the fact. The owner of goods in a case like this does not in fact appoint or employ the successive carriers in the continuous line as his agents to hold his money for him, and as his agents carry it

forward and contract in his behalf with the other roads for further transportation. He makes but one contract for one price; he pays the price, and the money he has paid does not belong to him, but to the associated carriers in proportions fixed by their agreement. He does not inquire, nor is he interested to know, how they divide the money. The contract is entire and complete when he pays the price for transportation through, and everything to be done afterwards is regulated by the standing agreement among the associated carriers. He has no control over them as his agents; he does not and cannot intermeddle with the manner in which they do the business or dispose of the money that he has paid for the carriage of his goods.

Let us see what are some of the consequences that would follow, if both parties in a case like this should act on the defendants' view of their legal rights. Suppose in this case the goods had been carried through to New York, and the defendants had not paid to the next carriers the proportion of the freight-money which belonged to the other carriers; and then suppose that the Norwich & Worcester Railroad should sue the plaintiffs for carrying the goods over their road. It would avail the plaintiffs nothing to say that they had paid the freight through when the goods were received at this end of the route. The ready answer would be: "To be sure, you put money into the hands of your agents, the Worcester & Nashua Railroad, to pay us, but they neglected their duty; your money is still in their hands, and we are not paid." It is, however, quite clear, that the money received by the defendants for transportation through on the connected line would be held by them for all the parties to the line; they would be bound to account for it under their agreement as one partner accounts with his fellows for money received on partnership account. Then if the plaintiffs should undertake to pay the different carriers, how are they to know the share of each? The proportions of the freight-money belonging to them respectively are regulated by a private agreement of which the plaintiffs know nothing, and of which in the way the business is actually conducted they have no need to be informed. If the plaintiffs had proposed when they delivered the goods to pay the Worcester & Nashua road their proportion of the freight-money and afterwards to pay the other carriers their respective shares, they probably would have found nobody to tell them what the different shares were, or to receive the goods to be carried on such terms. In truth the connected line transacts business as one joint concern, and the business cannot be transacted otherwise with convenience either to the carriers or the owners of the goods.

Then if we look to the remedy of the associated carriers for the recovery of the freight-money, each, on the theory of the defendants, must bring a separate suit on the separate contract for his proportion of the money. We have had occasion to learn from the facts stated in another case now pending before us that there is a connected line consisting of six or seven different railways extending from Ogdensburg in New York through Vermont and New Hampshire to Boston in Massachusetts, in which one price is paid for transportation through and the money divided by a standing agreement as in this case. If goods are carried through on this route, and there are six or seven different contracts, one with each road, then each road must bring a separate action for its share of the freight-money. If it should be said that the remedy

of the roads is to retain the goods at the end of the route till the whole price for transportation through is paid, this, in the first place, would show that these roads are so combined that for their own purposes they are a unit, while they insist that they are wholly separate and independent when the owner seeks redress for the loss of his goods. And then again, if the roads act separately and are not jointly interested in the business of the connected line, when one of the roads parts with the possession of goods by delivery to another, it loses its lien for the freight-money, and cannot transfer it to another independent carrier: Angell on Carriers 357, 359, 609. This is not at all like the maritime lien, when a voyage is broken up and the cargo is put on board another vessel to be carried to the port of destination. There the lien on the cargo for the whole freight is transferred to the second vessel, which completes the transportation under one contract.

The use of steam in carrying goods and passengers has produced a great revolution in the whole business. The amount and importance of it have of late vastly increased and are every day increasing. The large business between different parts of the country is done, as in this case, by parties who are associated in long continuous lines, receiving one fare through and dividing it among themselves by mutual agreement. They act together for all practical purposes so far as their own interests are concerned as one united and joint association. In managing and controlling the business on their lines they have all the advantages that could be derived from a legal partnership. They make such an arrangement among themselves as they see fit for sharing the losses, as they do the profits that happen in any part of their route. If by their agreement each party to the connected line is to make good the losses that happen in his part of the route, the associated carriers, and not the owner of the goods, have the means of ascertaining where the losses have happened. And if this cannot be known, there is nothing unreasonable or inconvenient in their sharing the loss, as in case of a legal partnership, in proportion to their respective interests in the whole route.

They undertake the business of common carriers, and must be understood to assume the legal liabilities of that business. They transact the business under a change of circumstances; but the principles and the general policy of the common law, which, as an elementary maxim, holds the common carrier liable for all accidental losses, must be applied to these new methods of transacting the same business; and there is certainly nothing in the present condition of the business, which calls for any relaxation of the old rule. The great value of commodities transported over these connected lines; the increased risk of loss and damage from the immense distances over which they carry goods; the fact that where goods are once intrusted to carriers on these long routes they are placed beyond all control and supervision of the owner; are cogent reasons for holding those who associate in these connected lines, to a rule that shall give effectual and convenient remedy to the owner, whose goods have been lost or damaged in any part of the line. Any rule, which should have the effect to defeat or embarrass the owner's remedy, would be in direct conflict with the principles and whole policy of the common law.

What then is the situation of the owner, whose goods have been

damaged or lost on a continuous line of three or any larger number of associated carriers, if he can look only to the carrier, on whose part of the route the damage may have happened? In the first place he must set about learning where his loss happened. This would often be difficult and sometimes quite impossible. Suppose an invoice of flour shipped in good order at Ogdensburg were found on arrival at Boston to have been damaged somewhere on the route; or suppose a trunk checked at Boston for Chicago was broken open and plundered before it reached Chicago, what would the owner's chance be worth of finding out in what particular part of the route the damage happened? He would have no means of learning himself; and he would not, unless of a very confiding disposition, rely on any very zealous aid in his search from the different carriers associated in the connected line. And if he should have the luck to make the discovery, he might be obliged to assert his claim for compensation against a distant party, among strangers, in circumstances such as would discourage a prudent man, and induce him to sit down patiently under his loss rather than incur the expense and risk of pursuing his legal remedy under the rule set up by these defendants. The forlorn condition of the owner in such a case is put in a strong light by WAITE, C. J., in his dissenting opinion, *Elmore* v. *The Naugatuck Railroad*, 23 Conn. 478, where he says: "A merchant residing in Cleveland, Toledo, or Chicago, purchases goods in the city of New York, which he wishes to send to his place of business. He enters into a contract with a railroad company for their transportation, not to any given point on the route, but for the whole distance. He delivers the goods to the company and they are taken and locked up in freight cars. He does not accompany them, and often sees and hears nothing more of them until they are delivered to him at their place of destination. The cars in which they are placed are often run over roads belonging to different companies to save trouble and expense of change of cars. If the goods are lost or damaged on the route he ordinarily has no means of determining where or in whose custody the injury occurred. The trouble and expense of ascertaining that fact in many cases would amount to more than the whole damage. As a prudent, cautious man he would be unwilling to intrust his goods to the custody of others, unless he could find some person or company that would be responsible for their safe delivery." The remarks of SMITH, J., 34 New York 501, before cited, are of the same import, showing the difficulties and embarrassments of the owner, if he can only resort for compensation to the carrier in the connected line, on whose part of the route the damage happened.

A rule, which throws such difficulties in the way of the owner who seeks to recover of common carriers for the loss of his goods, I cannot but regard as a wide departure from the general doctrine of the common law on this subject; and nothing is plainer than the duty of courts to apply the general principles of the common law to the new circumstances which are introduced by changes in the manner of transacting any business.

Few things are of greater importance to the whole country than the cheap, convenient, and safe transportation of goods between distant points. Vast sums of money are expended to promote this object. The business is already immense and constantly increasing. Most of this

business is done on connecting lines of railroads and steamboats, and these by continuous lines have a practical monopoly of the business on their respective routes. The owner of goods must intrust them to these associated carriers; they cannot be carried in any other way. Not only those who are engaged directly in carrying and sending goods are interested in this subject; all who produce and all who consume are interested that goods should be carried as cheaply, as conveniently, and as safely as possible. Public policy and the public interest concur with the general maxim of the law that those who transact this great business, should be held to a rule which shall give a ready and effectual remedy to the owner whose goods have been lost or damaged in any part of these connected lines of transportation.

There is a perplexing diversity of decision on this subject, in the different tribunals of this country. For instance, by the law of New York, as we understand it to be established by the construction which the courts have given to their statute, if goods are received in that state for transportation through on a connected line of railroads, the road that receives the goods is liable for loss or damage happening in any part of the connected line, though beyond the limits of the state: *Burtis* v. *The Buffalo & State Line Railroad*, 24 N. Y. 269. As has been before mentioned, there is a connected line of six or seven railroads extending from Ogdensburg to Boston. If goods are received by the Ogdensburg Railroad for transportation to Boston, and are lost or damaged on any part of the line, say on the Lowell Railroad, the Ogdensburg Railroad is liable for the loss. But if merchandise is received at Boston by the Lowell Railroad for transportation to Ogdensburg over the same connected line of railroads associated under the same agreement, the owner would be left to find out, if he could, on which of the six or seven connected roads his goods were lost or damaged, and could claim for his loss of that road alone. There would seem to be no remedy for this confusion and conflict of decisions unless the national legislature can provide one under the power given by the constitution to regulate commerce.

I come to the conclusion that on the case stated the plaintiffs are entitled to recover; and such is the unanimous opinion of the court.

The foregoing case is one of importance and interest, both to the profession and to business men, at this particular juncture, when the necessities of transportation are driving railway companies into the creation of extended lines of passenger and goods traffic, and when there continue to be such irreconcilable differences in the decisions of the different states in regard to the rights and responsibilities of the respective parties. The whole subject is so fully presented in the opinion, and the cases so extensively commented upon, that we should not feel justified in going over the same ground.

It has seemed to us that much of the apparent conflict in the decisions upon this subject might be measurably reconciled by defining, more carefully and exactly, the precise grounds upon which a contract for transportation beyond the line of the first carrier will be implied. It would scarcely do to refer the matter to the determination of the jury, in each particular case. That would be likely to produce too much uncertainty for practical convenience. The great argu-

ment in favor of the English rule, as declared in *Muschamp* v. *Lancaster and Preston Railway*, 8 M. & W. 421, and other subsequent English cases is, that it establishes a fixed and definite rule, and one that meets, fairly enough, the practical convenience of the public. But that is not all that is to be sought after. We must, and should have some reference to the public duties of common carriers and what those who employ them may fairly demand of them. It is very obvious that carriers, for their own protection, and to extend their business, would naturally desire to conduct it upon such principles, as to afford reasonable and just accommodation to their employers. And it seems but reasonable and just that all judicial constructions should be made in the same direction and with the same end in view. And we by no means intend to intimate that this has not always been the case in the decisions bearing upon this subject, and as affecting the numerous incidental questions involved. But it has seemed as if that consideration might safely have been permitted, in some cases, to have had a more controlling influence than was allowed. We comprehend, well enough, that a fixed rule made by declaring a hard and fast line and steadfastly adhering to it, with no reserve or qualification, is sometimes supposed to save courts a vast deal of perplexity, which a sliding scale or rule, more or less resting in discretion, would be almost sure to produce and to multiply almost indefinitely. And still too great, or too strict, adherence to abstract rules is sure to produce injustice in extreme cases. It seems to us, if we must have a fixed rule, that the English rule upon this subject is more just and more practicable, than any inflexible application of the rule of limiting responsibility to the line of the first company can be made; and especially where there is an acknowledged business connection between the different companies.

It is not always easy to define precisely what connection between different companies, in the transportation of goods, shall bind the first company throughout the line. But in a case like the principal one, where the goods are billed through, and the entire freight paid, there should, it would seem, be no question that such facts should be regarded as evidence of an express contract to carry through. There can be no doubt the parties to such a transaction ordinarily so regard it. It is a forced and unnatural construction to regard it in any other light. The consignor in no sense regards the agent of the first company as contracting in the capacity of agent for the successive companies, but as the agent for the first company, whose agent he is, and whose agent only. The case of *Schneider* v. *Evans*, 9 Am. Law Reg. N. S. 536, is of this character, and the erroneous conclusion of the court in that case was brought about by attempting to give the transaction the forced and unnatural construction of allowing the successive companies to demand more than their proportion of the entire sum stipulated by the first company for the entire freight. How much less than this shall be held as amounting to an express contract to carry through, it will not, at once, be easy to determine. But the exigencies of business and the experience of the courts will, from time to time, enable us to fix and define the proper limitations. The case of *Darling* v. *Boston and Worcester Railroad*, 11 Allen 295, fell very much short of this, and the court held the facts in that case not inconsistent with separate responsibility.

In *Boroughs* v. *Norwich and Worcester Railroad*, 100 Mass. 26, there was nothing more than in the next preceding case, upon which to found an implication

of an undertaking for the entire route, except the tariff of freight posted in the office of the first company, which gave the through rate in one item, without distinguishing the particular rate of the separate companies. This alone would not be very conclusive of an undertaking to carry through. But the difficulty was, in this particular case, if so applied, that the bill contained an exception of the very risk upon which the loss occurred, and would, therefore, be fatal to the plaintiff's case, if made to form the basis of responsibility. But the case of *Gass* v. *New York, P., and B. Railroad*, 99 Mass. 220, did contain the feature of charging through freight, and the court held it not sufficient upon which to imply an undertaking for the entire route on the part of the first company. But we think the principal case must be regarded as having established, upon most unquestionable grounds, the rule that the first company of a continuous line of transportation receiving goods and accepting the freight through and giving a bill through, must be understood as undertaking for the entire route, unless there is something in the bill of lading, or receipt, or other documents referred to as part of the contract, to indicate a different understanding, or unless the usages of the business or the custom of the line known or accessible to the knowledge of the shipper, show that such was not the expectation of the parties. Starting from this safe point, and assuming that in the absence of all business connection between the different lines, the responsibility is several as to each company for its own defaults only, we trust the courts will hold such a judicious control over the construction of different classes of contracts upon this subject as to reach the actual or probable justice of each particular class. But it will not be easy to define, in advance, precisely how much weight shall be given to each particular feature in a transaction, or what particular facts or circumstances shall be held decisive in regard to the first company being, or not being, holden throughout the line.

The tendency in this country is unquestionably in the direction of extended lines of transportation, either by actual consolidation of stock, by leases, or by some business arrangement, more or less stringent. And with this tendency we must expect a corresponding tendency towards holding the first company bound for the entire transportation. And it would seem not unreasonable where there is a fixed business connection throughout the line, that the first company should be holden to the extent of such business connection. It is certainly much easier for the first company to obtain indemnity from its associates than for the shipper to seek it of strangers, which all the subsequent companies must be regarded as to him. And it would seem far more just to hold the first company responsible for the defaults of its associates than to hold that the shipper must find evidence to make his case against them, when it is so easy for them to cover it up by means of the facilities growing out of the very association.

If we ever reach the point towards which we have been drifting from the first establishment of railways in the country, of regarding them as a part of the commerce between the different states, and as much subject to the national control as the commerce which is carried on by means of navigation upon the ocean, through the numerous bays and inlets along the coast, we may expect something more definite, either by way of legislation or judicial construction upon the important questions here involved. How long we shall be doomed to endure the embarrassments resulting from local legislation and conflicting judicial constructions upon this and numerous other embarrassing questions connected with railway traffic it is im-